FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DECISIONS

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Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

OCTOBER

The following cases were Directed for Review during the month of October:

Secretary of Labor, MSHA v. Great Western Electric Company, Docket Nos. WEST 81-213-RM, 81-258-M. (Judge Morris, September 7, 1982)

Roger Sammons v. Mine Services, Inc., division of Drummond Coal Co., Docket No. SE 82-15-D. (Judge Koutras, September 15, 1982)

Secretary of Labor, MSHA v. Florence Mining Co., Helen Mining Co., etc., Docket Nos. PITT 77-15, etc., IBMA 77-32. (Reconsideration of Commission's decision dated August 31, 1982)

Review was Denied in the following case during the month of October:

Lehman Gilliam v. Blue Diamond Mining, Inc., Docket No. KENT 80-288-D. (Judge Steffey, September 9, 1982)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 29, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. PENN 81-106-R
v.	:	
CONSOLIDATION COAL COMPANY	:	

DECISION

This case involves the interpretation and application of section 104(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. IV 1980). 1/ The specific issue before us is the procedural propriety of the administrative law judge's modification

1/ Section 104(d) of the Mine Act, 30 U.S.C. § 814(d) (Supp. IV 1980), provides:

> (1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation ... to be withdrawn from ... such area until an authorized representative of the Secretary determines that such violation has been abated.
>
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

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of an invalid section 104(d)(1) withdrawal order to a section 104(d)(1) citation. 2/ For the reasons that follow, we conclude that, under the specific circumstances of this case, the judge acted properly and we accordingly affirm his decision.

The facts are not in dispute. On February 2, 1981, the Secretary of Labor issued a section 104(d)(1) citation to Consolidation Coal Company ("Consol") alleging a violation of Consol's ventilation plan. Consol filed a notice of contest of this citation. FMSHRC Docket No. PENN 81-92-R. On February 26, 1981, the Secretary issued Consol a section 104(d)(1) withdrawal order which the parties settled on July 10, 1981. 3/ On March 4, 1981, the Secretary issued another section 104 (d)(1) withdrawal order. This order alleged improper grounding of equipment in violation of 30 C.F.R. § 75.701-3. 4/ The withdrawal order further alleged that the violation was significant and substantial and was caused by Consol's unwarrantable failure to comply with the law. On the same day the withdrawal order was issued, Consol abated the allegedly violative condition. Consol subsequently filed a notice of contest of this second order, which is the subject of the proceeding now before us.

On September 24, 1981, the administrative law judge issued his decision in Docket No. PENN 81-92-R, finding that the violation cited in the February 2, 1981, section 104(d)(1) citation, although significant and substantial, was not caused by Consol's unwarrantable failure to comply. Given this conclusion, the judge modified that citation to a section 104(a) citation, which he then affirmed. Consolidation Coal Co., 3 FMSHRC 2207, 2208-10 (September 1981) (ALJ). Neither party sought Commission review of this decision. After the judge's decision in Docket No. PENN 81-92-R, however, Consol filed a motion for summary decision in the present case, pursuant to Commission Rule 64, 29 C.F.R. § 2700.64, 5/ seeking vacation of the March 4, 1981 withdrawal order on the grounds that it now lacked a necessary underlying 104(d)(1) citation.

2/ The judge's decision is reported at 4 FMSHRC 49 (January 1982).

3/ This settlement is not before us.

4/ Section 75.701-3 provides in relevant part:

> For the purpose of grounding metallic frames, casings and enclosures of any electric equipment or device ..., the following methods of grounding will be approved[:]
>
> (b) A solid connection to the grounded power conductor of the system....

The order alleged improper grounding of an electrically-operated pump, in that uninsulated and exposed wiring was present in the pump frame.

5/ Commission Rule 64 provides in part:

> (a) Filing of motion for summary decision. At any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the judge to render summary decision disposing of all or part of the proceeding.
>
> (b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.

At the outset of the hearing on Consol's contest of the March 4th withdrawal order, the judge ruled from the bench that a valid 104(d)(1) citation is a prerequisite to issuance of a 104(d)(1) withdrawal order. He found that, as a result of his September 24, 1981, decision invalidating the 104(d)(1) citation underlying the withdrawal order in this case, no precedential 104(d)(1) citation existed upon which to base the 104(d)(1) withdrawal order at issue. 4 FMSHRC at 50-51. 6/ He held, however, that the proper procedure under the circumstances was not vacation of the withdrawal order, as urged by Consol, but rather conditional modification of the order to a 104(d)(1) citation, followed by a full hearing on the merits of the modified citation. Id. at 51; Tr. 4-19. The judge made the conditional modification on his own motion. The Secretary's counsel, upon being questioned by the judge, declined to make his own motion for modification of the second withdrawal order and expressed his "satisfaction" with the judge's sua sponte action. Tr. 17.

The judge thus granted Consol only partial summary decision. He denied total summary decision because in his view a factual dispute remained as to the validity of the conditionally modified citation. The judge emphasized that if the evidence failed to show a significant and substantial violation caused by an unwarrantable failure to comply, the tentatively modified 104(d)(1) citation would fail, and that if the evidence failed to show a violation at all, the case would be dismissed. Tr. 16. At the close of the hearing, the judge confirmed his modification and affirmed the 104(d)(1) citation. 4 FMSHRC at 51-5. We granted Consol's subsequent petition for discretionary review. 7/

Consol's arguments on review are narrow and, for the most part, procedural. Consol contends only that the judge lacked authority to modify the withdrawal order in this case on his own initiative and prior to a hearing. At the hearing below, Consol admitted the underlying violation, and challenged only the special 104(d)(1) findings. Consol does not now, however, seek review of the judge's conclusion that the violation was significant and substantial and caused by its unwarrantable failure to comply with the law. We conclude that the judge acted properly.

We first consider the question of modification from a general perspective. Sections 104(h) and 105(d) of the Mine Act expressly

6/ The judge also denied the Secretary's motion to convert to a 104(d)(1) citation the first withdrawal order of February 26, 1981, which, as noted above, had been settled by the parties. 4 FMSHRC at 50-51. The Secretary has not challenged this aspect of the judge's ruling.

7/ We also granted the motion of the United Mine Workers of America to intervene on review, and subsequently heard oral argument in this case.

authorize the Commission to "modify" any "orders" issued under section 104. 8/ This power is conferred in broad terms and we conclude that it extends, under appropriate circumstances, to modification of 104(d)(1) withdrawal orders to 104(d)(1) citations. In this case, and in future ones raising similar issues, we will define such "appropriate circumstances." Where, as here, the withdrawal order issued by the Secretary contains the special findings set forth in section 104(d)(1), but a valid underlying 104(d)(1) citation is found not to exist, an absolute vacation of the order, as urged by the operator, would allow the kind of serious violation encompassed by section 104(d) to fall outside of the statutory sanction expressly designed for it--the 104(d) sequence of citations and orders. The result would be that an operator who would otherwise be placed in the 104(d) chain would escape because of the sequencing of citations and orders. Such a result would frustrate section 104(d)'s graduated scheme of sanctions for more serious violations. 9/

8/ Section 104(h) of the Mine Act, 30 U.S.C. § 814(h)(Supp. IV 1980), provides:

> Any citation or order issued under this section shall remain in effect until modified, terminated or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Commission or the courts pursuant to section 105 or 106.

Section 105(d) of the Mine Act, 30 U.S.C. 815(d)(Supp. IV 1980), provides:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104,... the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance....

9/ Modification under such circumstances is also consistent with our settled precedent. We held in Island Creek Coal Co., 2 FMSHRC 279, 280 (February 1980), that allegations of a violation survived the Secretary's vacation of the 104(d)(1) withdrawal order in which they were contained and, if proven at a subsequent hearing, would have required assessment of a penalty. We reached a similar result in a companion case in which we held that allegations of violation also survived Secretarial vacation of an invalid 107(a) order (imminent danger). Van Mulvehill Coal Co., Inc., 2 FMSHRC 283, 284 (February 1980). In both cases, we thus contemplated future trial of the allegations as possible 104(a) violations. (Neither of the vacated withdrawal orders had contained significant and substantial findings.) If less serious allegations of 104(a) violations survive, then, a fortiori, the more serious allegations in the present type of case should survive as potential 104(d)(1) violations. In short, the purport of our decisions is that such allegations survive, and modification is merely the appropriate means of assuring that they do.

Any modification must be carried out on fair notice and otherwise comport with relevant requirements of due process. In an analogous situation arising under section 104(d)'s virtually identical predecessor provision, section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("the 1969 Coal Act"), we approved an administrative law judge's modification of invalid 104(c)(1) orders to 104(c)(2) orders. Old Ben Coal Co., 2 FMSHRC 1187, 1189-90 (June 1980). 10/ We premised our approval of the modification on the fact that the operator had not shown prejudice, had not claimed lack of notice, and had not indicated how its defense to a (c)(2) order would differ from its defense to a (c)(1) order. Id. Similar considerations guide our disposition of the present case.

In light of these general principles, we now return to Consol's specific objection that the judge's modification in this case was procedurally improper. From all that appears on the record, had the Secretary sought modification of the second withdrawal order prior to trial, Consol would not have believed itself procedurally aggrieved. The essence of Consol's complaint is that the Secretary, not the judge, should have modified the order, and that even if a Commission judge may modify a 104 order, section 105(d) of the Mine Act mandates that he act only after--not before--"afford[ing] an opportunity for a hearing." We cannot agree to so restrictive a reading of the powers conferred by section 105(d).

Consol contends that the responsibilities of the Secretary and Commission judges differ, and that the judge's modification was a usurpation of Secretarial duties. The Secretary's responsibility is to issue section 104(d)(1) citations and orders, and to prosecute them upon contest by the operator. Accordingly, where as here an order fails for lack of a valid citation, the preferable procedure after contest and assumption of jurisdiction by the Commission, would be for the Secretary to move for modification or amendment to recharacterize the order as a citation. 11/ In this case, however, for reasons unexplained, the Secretary's counsel declined to make such a motion, but rather acquiesced in the judge's preliminary modification. Had the judge vacated the withdrawal order, a trial of the special 104(d)(1) findings would not have occurred, a result that would have frustrated the purpose of section 104(d).

10/ The original orders had been issued outside the 90-day limit in section 104(c)(1) (carried over to the Mine Act) and therefore, assuming other requirements were met, should have properly been issued as 104(c)(2) orders.

11/ Such change after a notice of contest has been filed must occur by motion, and not on the Secretary's own initiative. See Climax Molybdenum Co., 2 FMSHRC 2748, 2750-51 (October 1980)(Secretary cannot unilaterally vacate a contested citation.)

We emphasize that the necessary special findings were contained in the order when it was issued. Hence the judge was not adding new findings to "create" a 104(d)(1) citation. Given the purpose of section 104(d) and the broad power to modify granted the Commission and its judges in section 105(d), we cannot agree with Consol that under these circumstances the judge erred.

Our decision might have been different had Consol demonstrated prejudice. We find, however, that there was no prejudice and that the judge's actions were entirely consistent with due process. The judge granted Consol a full hearing to contest the violation and the special 104(d)(1) findings. Consol did not, as it could have done, claim prejudice or request a continuance when it was required to defend against the tentatively modified 104(d)(1) citation. Consol did not show--nor do we see how it could have shown--how its defense to the 104(d)(1) citation would differ from its defense to the 104(d)(1) withdrawal order which contained precisely the same allegations. When asked about prejudice at the oral argument, Consol claimed it was prejudiced because it was forced to go to hearing on the merits of the citation. Arg. Tr. 13. However, a party moving for summary decision must always be prepared to go to trial if the motion is wholly or partially denied; that does not constitute prejudice. Cf. Old Ben Coal Co., supra.

Consol also argues that, in any event, the judge could not modify the order prior to the hearing. However, the judge did not modify the order in a final sense prior to hearing. His action was no more than a preliminary procedural ruling expressly conditioned on the outcome of the subsequent evidentiary hearing. Tr. 16, 18-19. Only after the hearing did the judge issue his decision finally modifying the order and affirming the citation. Thus, we are satisfied that Consol received an "opportunity for a hearing" before the final binding modification occurred in this case.

Finally, Consol argues that cases arising under the 1969 Coal Act, in which the Interior Board of Mine Operations Appeals held that administrative law judges lacked the authority to modify withdrawal orders, should control resolution of the issues in the present Mine Act proceeding. This precedent is not dispositive. Section 105(b) of the 1969 Coal Act, 30 U.S.C. § 815(b)(1976), 12/ authorized the Secretary

12/ Section 105(b) of the 1969 Coal Act provided:

> Upon receiving the report of such investigation, the Secretary shall make findings of fact, and he shall issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating the order, or the modification or termination of such order, or the notice, complained of and incorporate his findings therein.

of Interior to modify withdrawal orders issued under section 104(c), the statutory predecessor of section 104(d) of the Mine Act. The Board and its judges were part of the Department of Interior, and the Secretary had, by regulation, delegated to them his adjudicative functions under the Coal Act. 43 C.F.R. § 4.500 et seq. (1971) (rescinded 1978). The Board held that administrative law judges had no power to convert invalid 104(c) orders to notices of violation. See, for example, Freeman Coal Mining Co., 2 IBMA 197 (1973), aff'd on other grounds, 504 F.2d 741 (7th Cir. 1974). The Board viewed such modification as a usurpation at the Secretary's prosecutorial authority to issue notices of violation. Freeman, supra, 2 IBMA at 209-10. The Board determined that only certain specified adjudicative powers had been delegated to it, and that issuance or modification of notices or orders were not among them. Id. In contrast, under the Mine Act, the Commission and the Secretary are independent and wholly distinct entities, each possessing the powers specified in the Act. Section 105(d) expressly authorizes the Commission to modify 104 orders. Thus, given the language of section 105(d), and the allocation of powers under the Mine Act, the delegation problems perceived by the Board in Freeman simply do not arise under the present Act. 13/ See generally, Sewell Coal Co., 3 FMSHRC 1402, 1404 (June 1981).

13/ Consol also contends that the judge erred by failing to grant it total summary decision. The moving party is only entitled to summary decision if there is no genuine issue as to any material fact, and if summary decision should be rendered as a matter of law. As we decided above, Consol was not entitled as a matter of law to a vacation of the subject order.

We conclude that the judge below did not err procedurally in modifying the 104(d)(1) withdrawal order to a 104(d)(1) citation and proceeding to hearing on the citation. Accordingly, we affirm the judge's decision. 14/

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

14/ Commissioner Nelson assumed office after this case had been considered by the other Commissioners. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary and is not required for the Commission to take official action. The other Commissioners reached agreement on the disposition of the case prior to Commissioner Nelson's assumption of office, and participation by Commissioner Nelson would therefore not affect the outcome. Accordingly, in the interest of efficient decision-making, Commissioner Nelson elects not to participate in this case.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 29, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 80-399
OLD BEN COAL COMPANY	:	

DECISION

This penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. IV 1980), and involves the interpretation of 30 C.F.R. § 77.1700, which provides:

> Communications in work areas.
>
> No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen.

The judge concluded that Old Ben Coal Company violated the standard in connection with a fatal accident which occurred when a bulldozer fell into a hole in a raw coal storage pile. 1/ For the reasons discussed below, we affirm.

The facts are basically undisputed. The coal pile on which the accident happened is located on the surface of the mine. The pile is cone-shaped and surrounds a vertical, 60-foot high stacking tube. Coal is brought from the mine by conveyors and discharged from the top of the stacker to form the storage pile. Bulldozer drivers, working on plateaus, or "benches," on the pile, push the coal away from the stacker toward four feeder holes located under the pile. The feeder holes are not visible to the bulldozer operator from the surface of the pile, but if coal is feeding properly, indentations, or "bird's nests," appear on the surface directly above the holes. By operating controls in the preparation plant, another employee, the preparation plant operator, opens and closes the feeder holes. Coal falls down through the holes on to an underground conveyor and is carried away to the processing plant.

1/ The judge's decision is reported at 3 FMSHRC 1886 (July 1981).

When the weather is damp and the coal pile large, coal does not always feed evenly into the feeder holes and "bird's nests" might not appear. Instead, cavities, or "voids," form between compacted coal near the top of the pile and looser coal at the bottom going into the feeder holes. Bridged-over voids are not visible from the surface. Although a bulldozer may be able to run over a bridge for a time, it is not uncommon for a bulldozer at Old Ben's mine to collapse the bridge and fall into a void. When a driver suspects a void, he puts the blade down and drives forward; the blade collapses the bridge, preventing the bulldozer from going too deeply into the void.

During the two-year period preceding the accident, the coal pile had become unusually large. The bench on which the bulldozer drivers were working was about 35-40 feet above the feeder holes. At the time of the accident on April 8, 1980, the weather was rainy and misty. Shortly before Robert Mitchell, the driver involved in the accident, started work on the midnight to 8:00 a.m. shift, another bulldozer fell into a void, but the driver was not injured and was able to pull his bulldozer out. However, he was visibly shaken, and requested a means of communication. Tr. 75, 83, 87, 107.

While Mitchell was working that night, the pile was illuminated by floodlights on the stacker and by his bulldozer headlights, but visibility was poor because of the weather. There was no radio, telephone or other means of communication in Mitchell's bulldozer. Three telephones were located about 200 yards away from the coal pile, and there was also a squawk box at some unspecified distance from the pile. Bulldozer operators were not required to use the telephones or squawk box at any set intervals, and communicated with the preparation plant on their own initiatives as the need arose. Mitchell's bulldozer was equipped with an operable back-up alarm that could be heard 300 yards away, and his bulldozer could have been seen at times during the shift when it was on certain parts of the coal pile. Old Ben conceded at oral argument before the Commission that, so far as the record shows, neither the preparation plant operator nor any other employee was required to observe or keep track of the bulldozer driver on the pile. Tr. Arg. 37-8. Mitchell used the telephones off the pile to contact the preparation plant employee twice during the first part of his shift. After Mitchell's last telephone call, about 2:30 a.m., no one had contact with him until his bulldozer, which had backed or fallen into a void and was buried in coal, was discovered about 6:00 a.m. Tr. 38-9, 199-200.

In concluding that Old Ben violated section 77.1700, the judge found that Mitchell was working alone in a hazardous area and was not "under observation" or in "sufficient communication with others to avoid a violation of the standard." 3 FMSHRC at 1891-92. On the grounds articulated below, we agree. We turn first to the threshold questions of whether Mitchell was working "alone" in an "area where hazardous conditions exist[ed] that would endanger his safety."

The term, "alone," which is not defined in the regulation, refers in common usage to being separated or isolated from others. Webster's Third New International Dictionary (Unabridged), at 60 (1971). In our

view, the standard is directed at situations where miners are effectively, or for practical purposes, working alone notwithstanding some occasional contact with others. Here, there is no dispute that Mitchell was working by himself on the coal pile. Old Ben argues that Mitchell was part of a "team," but the evidence shows that no one observed or had contact with him on a regular or continuing basis and Old Ben has conceded that no one was responsible for keeping in touch with him. Such interaction as Mitchell had with the preparation plant employee was sporadic and insubstantial. Under these circumstances, we conclude that Mitchell was working alone within the meaning of the standard.

In concluding that the coal pile was an "area where hazardous conditions exist," the judge held that the standard applies where hazardous conditions outside normal conditions in the mining industry are present. 3 FMSHRC at 1890-91. On review, Old Ben endorses the judge's definition of hazardous areas subject to the standard, but contends that the coal pile did not constitute an abnormal hazard. The Secretary advocates defining "hazard" in its ordinary sense, without reference to industry norms. On the facts of this case, we are satisfied that Old Ben's coal pile was a hazard under either definition or under any reasonable construction of the standard consistent with its protective purposes.

The pile was exceptionally large. As the coal pile grew and its surface became packed down because of moisture and the pressure of the bulldozers, voids were more likely to occur. Tr. 73-4, 84-5. It is undisputed that collapsing bridges over voids were fairly frequent occurrences at Old Ben's mine. The fact that these conditions had existed for some time without having been the subject of a previous citation by the Secretary does not, as Old Ben suggests, prove they were not hazardous. Further, on the night of the accident, these general risks would appear to have been aggravated. The weather was rainy and misty and visibility was poor. Another bulldozer operator had fallen into a void shortly before Mitchell's shift, and had requested better communication for bulldozer operators working on the pile. This incident alone placed, or should have placed, the operator on notice of the hazards. Under these circumstances, we are persuaded that substantial evidence supports the judge's conclusion that on the night of the accident conditions atop the coal pile were hazardous within the meaning of the standard. We emphasize that our conclusion is based on the facts of this case. We do not mean to intimate that every coal storage pile would come within the standard because it is inherently "hazardous." Such determinations must be made on a case-by-case basis. We next consider the central issue of whether Mitchell was in sufficient communication or contact with others.

The standard's requirements that a miner be able to communicate, or be heard, or be seen are stated in the disjunctive, and an affirmative finding with respect to any of the three would preclude a determination of violation. The standard neither specifies its purpose nor the requisite level of communication or contact and, before analyzing the facts, we address these two subjects.

The judge assumed the standard was directed more towards rescuing miners after an accident than towards preventing accidents. However, nothing in the standard suggests that prevention is not a concern. Thus, we adopt the Secretary's position, because it is more consistent with the purposes of the Mine Act and the plain language of the standard: The standard has a dual purpose, to prevent accidents by timely warning when possible and to expedite rescue and minimize injury when an accident does occur.

While the individual terms used in the standard, "communicate," "be heard," or "be seen," are ordinary words, they take on a more complex meaning in the context of prevention and rescue. Obviously, they embrace the physical acts of communicating, hearing, or seeing. Of necessity, they also include equipment intended for such purposes as well as procedures for their use. In construing these terms, we reject either an approach requiring constant communication or contact under all conditions, or an approach allowing any minimum level of communication or contact to satisfy the standard. Rather, we hold that the standard requires communication or contact of a regular and dependable nature commensurate with the risk present in a particular situation. As the hazard increases, the required level of communication or contact increases. We now apply this test to each requirement of the standard.

We disagree with Old Ben that the telephones located off the coal pile satisfied the communication requirement. The telephones were not actually available if, as here, an emergency arose on the coal pile. As a practical matter, driving off the pile frequently to use a telephone would interfere with the bulldozer driver's responsibilities, and he would be reluctant to do so. Tr. 27, 82, 99, 201. Both the preparation plant employee and another bulldozer driver testified that no procedures had been established for communicating by telephone; they used the phones solely on their own initiatives. Tr. 73, 111-12. Moreover, we note that Old Ben was on notice as to the inadequacies of this telephone system. The preparation plant employee (who was also a bulldozer driver) and the driver who had fallen into a void the previous shift testified, without effective rebuttal by Old Ben, that they had requested communication for the coal pile several times before. Tr. 75, 83, 87, 143, 161; see also Pet. Exh. 14. Thus, substantial evidence supports the judge's conclusion that the operator failed to provide communication of a regular or dependable nature commensurate with the risk involved. 3/

3/ Old Ben mistakenly asserts that the judge held that the standard required constant two-way radio communication. The judge held only that the communication available was insufficient. He specifically stated that two-way communication, while "a much safer way to operate the raw coal storage pile," was not required by the standard. 3 FMSHRC at 1892. These statements were dicta and we need not decide whether two-way radios would be in excess of the standard.

Evidence that Mitchell could be heard and seen at certain times and under certain circumstances also fails to satisfy the standard. The sound of the bulldozer back-up alarm was not a call for help, but merely a signal that the machine was in reverse. Of course, a back-up alarm offers no protection if trouble arises while a vehicle is going forward. In any event, because no one was responsible for listening for Mitchell, it is unlikely that anyone would have responded to the back-up alarm or have heard a call for help. Tr. 176-77. Similarly, although Mitchell could be seen at times by the preparation plant employee, the gob truck driver, and other employees, there was a considerable discrepancy between what miners theoretically could see and what they actually saw. In our view, it is highly significant that the last known contact with Mitchell was about 2:30 a.m., and that the accident was not discovered until about 6:00 a.m. Mitchell was completely out of sight and hearing for about 3-1/2 hours. Therefore, substantial evidence supports the judge's conclusion that Mitchell was not "under observation."

In sum, we conclude that during a time when this employee was working alone on a hazardous coal pile, he could not communicate with others nor could he be heard or seen on a regular or dependable basis commensurate with the risk involved. 4/ Accordingly, we affirm the judge's conclusion that Old Ben violated the standard. 5/

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

4/ Old Ben argues that the judge erred because he imposed liability even though he found no nexus between the fatal accident and the alleged violation. As we have repeatedly emphasized in our decisions, the fact of an accident or injury does not by itself necessarily prove or disprove the existence of a violation. See, for example, Lone Star Industries, Inc., 3 FMSHRC 2526, 2529-30 (November 1981). A violation may occur absent an accident, and an injury or death does not ipso facto make out a violation. As here, however, an accident may sometimes shed light on an unsafe situation that had escaped previous notice or citation. Our holding means that the standard would have been violated under the circumstances present on the night of the accident regardless of whether Mitchell had fallen into a hole and been hurt, escaped injury, or avoided an accident altogether.

5/ Commissioner Nelson assumed office after this case had been considered by the other Commissioners. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary and is not required for the Commission to take official action. The other Commissioners reached agreement on the disposition of the case prior to Commissioner Nelson's assumption of office, and participation by Commissioner Nelson would therefore not affect the outcome. Accordingly, in the interest of efficient decision-making, Commissioner Nelson elects not to participate in this case.

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

	CIVIL PENALTY PROCEEDINGS
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	DOCKET NO. WEST 81-63-M A/C No. 10-00556-05010 DOCKET NO. WEST 81-64-M A/C No. 10-01382-05002 DOCKET NO. WEST 81-102-M A/C No. 10-00556-05012 F DOCKET NO. WEST 80-285-M A/C No. 10-00556-05008 MINE: State Pit El 109 and Dry Valley
Petitioner,	
v.	
WASHINGTON CORPORATION, d/b/a/ WASHINGTON CONSTRUCTION COMPANY,	DOCKET NO. WEST 81-351-M A/C No. 10-00634-05004 MINE: Monsanto Quartize Quarry (Consolidated)
Respondent.	

DECISION

Appearances:

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For the Petitioner

Mr. James A. Brouelette, Safety Officer
P.O. Box 8989, Missoula, Montana 59807
For the Respondent

Before: Judge Virgil E. Vail

These consolidated cases arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979), "hereinafter the Act", involve the same parties, and petitions for assessment of civil penalties by the Secretary against the respondent. A hearing on the above cases was held on July 27, 1982, at Idaho Falls, Idaho. The parties waived filing post-hearing briefs.

DOCKET NOS. WEST 81-351-M and WEST 81-64-M

At the commencement of the hearing, the Secretary moved to dismiss Docket No. WEST 81-351-M involving Citation No. 353269 and Docket No. WEST 81-64-M involving Citation No. 350433. The reason presented for dismissing these two cases was that the principle witnesses, the mine inspectors, could not be located and therefore were unavailable for the hearing.

Counsel for the Secretary stated that reasonable effort had been made to locate the inspectors but due to the release of these men from their duties because of a reduction-in-force he was unable to find them. The Secretary stated that without this testimony, he was unable to prove these cases. The motion was unopposed and based on good cause presented, I granted same.

DOCKET NOS. WEST 80-285-M and WEST 81-63-M

Regarding the above two cases, respondent had stated in the answer in both cases the same defense, that is, the timeliness of the Secretary in issuing its proposal for assessment of a penalty. It was agreed by the parties at the hearing that they would present the facts at that time for a ruling thereon.

In Docket No. WEST 80-285-M, Citation No. 351050 was issued to the respondent on August 4, 1978 and abated on August 9, 1978. Citation No. 349218 was issued on July 18, 1979 and was terminated on January 30, 1980. On May 19, 1980, a petition for the assessment of a penalty was proposed for these two citations by the Secretary and filed with the Commission. On December 10, 1981, the Secretary filed a motion to amend its petition for assessment of penalty by vacating Citation No. 349218 as he did not believe that he could prove this citation. This motion is granted and Citation No. 349218 is vacated.

In Docket No. WEST 81-63-M, Citation Nos. 351056, 351057, and 351059 were all issued to the respondent on August 4, 1978. The date of termination of all citations was August 9, 1978 and the proposal of a penalty was made on November 13, 1980. The Secretary filed its petition for assessment of penalty on August 19, 1981. Respondent argues that Section 105(a) of the Act requires that the operator must be notified within a reasonable time after the termination of such inspection or investigation of the penalty proposed. Respondent points out that in Docket WEST No. 81-63-M, the citations were terminated on August 9, 1978 and penalty was not proposed until November 13, 1980, which is more than two years later. In Docket No. WEST 80-285-M, the Citation No. 351058 was terminated on August 9, 1978 and proposal for a penalty was issued on March 11, 1980 which was over a year and a half later. As to both cases, respondent contends that this delay has prejudiced its ability to present a proper defense as it was not feasible to preserve the necessary evidence and is now difficult to know what witnesses would be required or available for presentation at the hearing (Tr. p. 7 and 10).

The Secretary argues that the respondent must show it has been prejudiced by the delay and also whether it had any defense in the first place for without a defense, the passage of time would not prejudice it. Also, that the respondent was put on notice that the violation existed and

that it was reasonable to assume the respondent would preserve such evidence necessary in defense of its position in these pending cases.

The Secretary stated that the delay in filing the proposal of a penalty in these cases was due to the fact that the department responsible for processing these assessments found its established method was not compatible with the volume of citations issued and they had to change their procedures (Tr. p. 9-10).

In these two cases, I reject the Secretary's arguments. Section 105(a) of the Act states in part as follows:

> If, after an inspection or investigation, the Secretary issues a citation under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under 110(a) for the citation cited *** (Emphasis added).

Obviously, the words "reasonable time" is crucial here. In a recent decision, the Commission considered a similar defense as that raised by the respondent here. In Secretary of Labor v. Salt Lake Count Road Dept., 3 FMSHRC 1714, (July 28, 1981), the Commission reasoned that consideration of procedural fairness to operators, must be balanced against the severe impact of dismissal of the penalty proposed upon the substantive scheme of the statute and, hence, the public interest itself. The Commission proposes two reasoned excuses to reach a fairness for both parties in such procedural matters and states as follows:

> In order to help strike a proper balance and to insure that the Secretary does not ignore section 105(d)'s injunction to act "immediately", we hold that if the Secretary does seek permission to file late, he must predicate his request upon adequate cause. C.F. Valley Camp Coal Co., 1 FMSHRC 791, 792 (1979) (excusing the late filing of an operator's answer for "adequate cause"). Such a requirement will guard against cases of abuse and also comports with analogous leeway extended to private litigants before the Commission. Valley Cam. Coal Co., supra. Nevertheless, cases may arise where procedural justice dictates dismissal. While the requirement of showing adequate cause for a filing delay may guard against administrative abuse, a stale penalty proposal may substantially hinder the preparation and presentation of an operators case.

The Commission therefore has established two tests to determine if the late filing of the proposal is in substantial compliance with the Act and,

therefore, should not be dismissed. The Secretary must show that there was adequate cause for the delay. The mine operator on the other hand must show it has been prejudiced by the delay. These two requirements are balanced against each other with the scales weighing heavily on the side of enforcement.

The above tests can be directly applied here. The delay of over two years in Docket No. WEST 81-63-M and over a year and a half in WEST No. 80-285-M is on its face a serious disregard of the objectives established by Congress for prompt assessment of a penalty for effective enforcement of the Act. A reasonable time to implement the assessment procedures by the Secretary should be condoned, but I am persuaded that the time limits of reasonableness were violated in the above two cases. I also find that the lengthy delay here has been inherently prejudicial to the operator's preparation of a proper defense.

For the above stated reasons, the citations in Docket Nos. WEST 81-63-M and WEST 80-285-M are dismissed with prejudice

DOCKET NO. WEST 81-102-M

STIPULATION

The parties at the hearing jointly agreed to submit the above case upon a stipulation of the facts. The issue for decision herein is, whether a violation of the Act occurred and, if so, whether a penalty should be assessed, and, if so, what the amount of the penalty should be.

The parties stipulated as follows:

1. Paragraph 1 of the petition for assessment of a penalty is admitted.

2. Respondent for all purposes of this proceeding is covered by the Act.

3. At all times material to this action, the respondent was engaged in the operation of a mine located in Soda Springs, Caribou County, Idaho. The name of such mine is Dry Valley Mine.

4. Respondent admits paragraph III of the petition for assessment of penalty.

5. As a result of an investigation of the aforesaid mine by an authorized representative of the Secretary of Labor on or about September 24 and 25 of 1980, Citation No. 350197 was issued to the respondent.

6. A copy of said citation may be admitted into evidence for the purpose of showing what was issued. (Joint Exhibit No. 6)

7. A total penalty of $5,000.00 was proposed for the aforesaid alleged violation.

8. A copy of MSHA's assessed violation history report may be admitted into evidence. (Joint Exhibit No. 5)

9. Respondent employed approximately 325 full time employees from September, 1980 to November, 1981. From December, 1981 to the present time respondent has employed approximately 75 full time employees.

10. Respondent mined approximately 2.5 million tons of phosphate per year on a contract basis during the years 1980 and 1981.

11. Payment of the proposed penalty would not affect respondent's ability to continue in business.

12. Respondent demonstrated good faith in achieving abatement after notification of the alleged violation.

13. The investigation report of John M. Moore, metal and nonmetal mine inspector, United States Department of Labor, may be admitted into evidence as representative of facts supporting the issuance of Citation No. 350197, and the facts pertaining to the accident which he investigated. (Joint Exhibit No. 4)

14. That it is Washington Construction Company's policy and practice that employees engaged in moving rail cars wear safety belts.

15. Respondent's employees are made aware at safety meetings and in training, of the requirement that they utilize safety belts when engaged in moving rail cars.

16. Joint exhibit No. 1 is a photograph of a portion of the rail car in which Todd Martindale was standing at the initial time of the accident. The platform has been encircled.

17. Joint exhibit No. 2 depicts a full side view of the type of rail car on which Todd Martindale was standing at the initial time of the accident.

18. Joint exhibit No. 3 depicts, among other things, the tipple which is in the immediate area where Todd Martindale was working on the night of the accident.

19. Joint exhibits 1, 2, and 3 may be admitted into evidence. Each fairly or accurately represents the scenes photographed by Mine Safety and Health inspector John Moore.

DISCUSSION

Following a fatal accident which occurred at respondent's mine at Soda Springs, Idaho, on September 23, 1980, a duly authorized representative of the Secretary conducted an investigation and issued Citation No. 350197 alleging a violation of 30 C.F.R. § 55.15-5. The citation alleges as follows:

> Todd Martindale, Social Security No. 518-94-7830, victim of a fatality at the Dry Valley Mine Tipple, was not wearing a safety belt at the time of the accident. The victim was standing on the braking systems work platform of the railroad car. The height of the platform from the ground was approximately 7 feet. The victim was knocked to the ground by cars up track striking the cars being loaded.

30 C.F.R. § 55.15-5 provides:

> Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the life line when bins, tanks, or other dangerous areas are entered.

From the facts included in the stipulation and the arguments of the parties at the hearing, it does not appear that there is an issue as to how the accident occurred. Further, respondent has a requirement that employees wear safety belts while moving rail cars. Predicated on this, I find that there was a violation of mandatory safety standard § 55.15-5.

The respondent argues that it has an established safety program and that in force in that program is the requirement that men wear safety belts while moving rail cars. That the foreman at the time of the accident was having a problem with start-ups and did not have time to check each individual on the job. The foreman was unaware of the fact that men were not wearing safety belts.

James A. Brouelette, safety officer for respondent, testified at the hearing that they have had problems with miners not wearing their safety belts and have threatened them with firing if they didn't comply. No one had been fired as the operator has a large turnover of employees and firing is the last resort (Tr. p. 23-24). He argued that the operator had not incurred an injury in the past for miners not wearing a belt or been cited for this and that the violation was a result of misconduct on the part of the employee and should not be charged as a violation against the operator.

This argument by the operator has been addressed by the Commission in the past. To prove a violation of the standard involved herein, as with most standards, "noncompliance with the standards terms need only be

shown ..." Eastern Associates Coal Corporation v. Secretary, 4 FMSHRC 835 (May 3, 1982). The mere occurrence of the infraction of the safety standard constitutes a violation since liability is imposed on the mine operator without regard to fault. El Paso Rock Quarries, 3 FMSHRC 35 (1981).

The failure of the miner in this case to wear the safety belt resulted in his death. This was a violation of the standard. Although the operator had a rule regarding the wearing of such belts, they also knew the men did not always comply and should have foreseen that an accident would result. The Court in Heldenfels Bros. v. Marshall, 636 F. 2d 312 (5th Cir. 1981) (unpublished opinion), involving an accident which also resulted solely from fault on the part of an employee, affirmed the principle of both strict liability and vicarious liability peculiar to the mine safety law and stated as follows:

> Heldenfels claims they were denied due process by the imposition of a civil penalty for this alleged violation. Underlying this due process argument is Heldenfel's assertion that there was nothing they could have done to prevent the accident in question. The Secretary responds by pointing out the fact that the Act imposes strict liability on operators for violation of regulations. This argument misses the mark. Heldenfels is not claiming that it should not be held liable since it was not negligent; Heldenfels argues that it should not be held liable because it did not cause the violation of the regulation. However, Section 110(a)(1) of the Act, 30 U.S.C. § 820(a)(1), authorizes assessment of a civil penalty against the operator of a mine when a violation of a mandatory regulation occurs at the mine. Thus, Congress has provided for a sort of vicarious liability to accompany the provision for strict liability. (emphasis added).

Therefore, it is found that respondent is liable for the violation of the mandatory safety standard committed by its employee.

ASSESSMENT OF PENALTY

The remaining issue is the amount of the penalty to be assessed against the respondent. The amount of the penalty must relate to the degree of the operator's culpability in terms of wilfulness or negligence, the seriousness of the violation, the size of the business, number of previous violations and respondent's good faith in abating the violative condition.

The stipulation in this case provided that respondent operates a small to moderate size mine and the imposition of a penalty in this case would

not impair their ability to continue in business. The history of prior penalties as shown in joint exhibit No. 5 did not reflect a large number of violations but did show several violations for which large assessments were made indicating several serious types of violations involved. The respondent demonstrated good faith in achieving abatement after notification of the violation in this case.

The uncontroverted evidence of record shows that the respondent made an effort to enforce safety rules at its mine including the use of safety belts. The Secretary in its argument for a penalty related that the mine inspector represented to him that respondent had a good safety policy. (Tr. p. 20) Further, the accident was such that it inflicted injury resulting in death only upon the employee himself and not upon other employees. However, there can be no shifting of responsibility from employer elsewhere for maintaining strict enforcement of its safety rules and although at times the operator may become discouraged, it must still continue to press for compliance from its employees. Because the record is void of evidence that the respondent was willful or grossly negligent in enforcing compliance with the mandatory standard herein, I believe a penalty less than that originally proposed is in order. However, because a grievous injury resulted from the non-compliance herein, a penalty of $1500.00 is assessed.

ORDER

In Docket No. WEST 81-351-M, Citation No. 353269 is vacated.

In Docket No. WEST 81-64-M, Citation No. 350433 is vacated.

In Docket No. WEST 80-285-M, Citation No. 349218 and 351058 are both vacated.

In Docket No. WEST 81-63-M, Citations Nos. 351056, 351057, and 351059 are vacated.

In Docket No. WEST 81-102-M, respondent is ORDERED to pay the Secretary the sum of $1500.00 as a civil penalty for the violation of 30 C.F.R. 55.15-5 within 40 days of the date of this decision.

Virgil E. Vail

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 6 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket Nos. CENT 81-186-M
	:	CENT 81-187-M
	:	CENT 81-188-M
v.	:	CENT 81-189-M
	:	CENT 81-190-M
WADE KEMP III, WILLIAM KURE, RUSSELL COLLINS, VIRGIL KELLY, EUGENE WEIGENSTEIN, DONALD DARRELL GOODMAN, Respondents	:	CENT 81-191-M
	:	Annapolis Quarry and Mill

DECISION

The captioned matters came on for a consolidated hearing before the trial judge in St. Louis, Missouri on July 13 through 16, 1982. Respondents were charged, as agents, with violating section 110(c) of the Act by knowingly authorizing, ordering, or carrying out the corporate mine operator's violation of the mandatory safety standard set forth in 30 C.F.R. § 56.9-2. The standard cited requires that equipment defects affecting safety be corrected before the equipment is used. The gravamen of the charge was that the individual respondents with knowledge that the braking system on a large haulage truck was defective authorized or ordered miners to operate the truck on a haulage road with several steep grades thereby endangering their lives. The corporate operator, GAF Corporation, had previously paid a modest civil penalty for the violation pursuant to section 110(a) of the Act.

On the third day of the hearing, Thursday, July 15, 1982, counsel for the Secretary moved to dismiss with prejudice the charges against respondents Kemp, Kure, Weigenstein and Goodman on the ground there was insufficient evidence to show they authorized or ordered use of the Euclid truck in question with knowledge of the alleged defective braking system. This motion was granted (Tr. 605).

Thereafter, the trial judge denied a motion to dismiss for failure to make a prima facie case against the other two respondents and they proceeded to present their defense-in-chief. After both parties rested, on Friday, July 16, 1982 counsel for the last two respondents moved to dismiss the charges against them on the ground that the Secretary failed

to establish their complicity in the violation charged by a preponderance of the reliable, probative and substantial evidence in the record considered as a whole. Counsel for the Secretary opposed this motion. After considering the arguments of counsel, together with their proposed findings and conclusions, the trial judge entered a tentative bench decision in which he found that because the Secretary had failed to prove either the violation charged or respondents' knowing participation therein the charges should be dismissed.

On September 20, 1982, counsel for the Secretary filed a motion to join respondents' motion to dismiss at the close of the evidence stating:

> "After reviewing the hearing transcript, particularly the testimony given by Respondents' witness, Eugene Weigenstein, (hearing transcript, pp. 814-924), Petitioner agrees that there is insufficient evidence to show that Respondents knowingly authorized, ordered or carried out the corporate mine operator's violation of 30 C.F.R. § 56.9-2. Accordingly, Petitioner now joins in Respondents' motion to dismiss on this particular ground. In the alternative, Petitioner independently moves to dismiss the Petitions against Respondents on said ground."

Counsel for respondents advised of his concurrence in the Secretary's motion on September 24, 1982.

The premises considered, it is ORDERED that the parties joint motion to dismiss the charges against respondents Kelly and Collins be, and hereby is, GRANTED and the captioned petitions be DISMISSED AS TO ALL RESPONDENTS WITH PREJUDICE.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
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OCT 7 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 80-380-M
v.	)	MINE: FMC
FMC CORPORATION,	)	
Respondent,	)	

Appearances:

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Henry C. Mahlman, Associate Regional Solicitor
United States Department of Labor
Denver, Colorado
for the Secretary of Labor

John A. Snow, Esq.
VanCott, Bagley, Cornwall and McCarthy
Salt Lake City, Utah
for the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, (MSHA), charges respondent, FMC Corporation, (FMC), with violating two safety regulations adopted under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. (Supp. III 1979).

After notice to the parties a hearing on the merits was held in Green River, Wyoming on September 1, 1981.

FMC filed a post trial brief.

ISSUES

The issues are whether respondent violated the regulations and, if so, what penalties are appropriate.

CITATION 575950

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 57.9-2, which provides as follows:

> Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

The evidence: on March 13, 1980 MSHA respresentative Merrill Wolford inspected a GMC pickup truck owned by Western Steel Company, a subcontractor for FMC (Tr. 3, 19, 27-28).

Another person turned the steering wheel of the truck while Inspector Wolford checked the suspension system. He observed that the idler arm, the ball joint, and the tie rods were loose. The loose linkage showed excessive wear (Tr. 4-7, P5).

In the opinion of the inspector excessive play in the steering system could cause the driver to loose control of the vehicle (Tr. 17-18). In addition, there could be a complete failure of the ball joint. It could come out of the socket or crystallize and break (Tr. 15).

The truck was being operated in the mine area in the presence of numerous workers (Tr. 9-10).

DISCUSSION

The evidence establishes a violation of the regulation, 30 C.F.R. Section 57.2.

Respondent attacks the credibility of MSHA's evidence, and relies on its own evidence.

I find MSHA's evidence to be credible. Inspector Wolford has had considerable experience in motor vehicle mechanical work. And the experience included work with front end alignments, tie rods, and ball joints. (Tr. 1, 2). In addition the credible evidence establishes the linkage and tie rods were loose and showed excessive wear (Tr. 6, 7, P6). The record establishes that there existed an "equipment defect" within the meaning of Section 57.9-2. It is also apparent that the defect "affected safety" since such excessive play could cause the operator to loose control of the vehicle (Tr. 17-18).

On the other hand I am not persuaded by FMC's defense. FMC offered no evidence to contradict the inspector's testimony as to the condition of the suspension system. The fact that Wolford did not drive the truck to check its steering would not, in my view, destroy his credibility. The inspector used a proper method to check the truck's suspension system.

In support of its view FMC relies on Judge George Koutras's decision in Medusa Cement Company, 1 MSHC 2554, (1980). It is apparent in Medusa Cement that Judge Koutras concluded that the worn steering control arm did not present a real safety hazard. I find to the contrary in this case: the defective parts, that is, the loose tie rods and the loose ball joints did affect safety.

For similar cases construing the meaning of 30 C.F.R. 57.9-2 compare Phelps Dodge Corporation, 4 FMSHRC 1078 (1982), and Allied Chemical Corporation, 4 FMSHRC 503 (1982).

The citation should be affirmed.

The parties do not address the proposed civil penalty of $106. Considering the statutory criteria, 30 U.S.C. 820(i), I deem that the proposed penalty is appropriate.

CITATION 575955

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 57.12-16 which provides as follows:

> Mandatory. Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power Switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

The evidence: before the FMC electrician began to soder the lines on the 480 volt air conditioner he turned the electrical switch to "off." (Tr. 3-6, 8). The air conditioner could not become operational with the switch off (Tr. 15). But the unit remained energized where the lines entered it and at the top of the contactors (Tr. 17, 20).

As he was sodering the electrician's left arm was two feet from the energized portion of the unit (Tr. 30). It was not necessary to have the unit energized in order to soder the lines (Tr. 48).

The center and bottom cover plates were removed because the worker intended to attach his air-conditioning hoses to the high side pressure valves (Tr. 15, 43). The electrical switches in the motor control center controlling this unit were not tagged or locked out (Tr. 32).

DISCUSSION

The evidence establishes a violation of the regulation. The 480 volt air conditioner was not deenergized before the FMC electrician sodered the lines.

FMC contends that the condition described in the citation is authorized by 30 C.F.R. Section 57-12. 32 and in any event, FMC asserts no violation occurred.

FMC initially contends that a different regulation, 30 C.F.R. Section 57-12.32, specifically authorizes the removal of cover plates during testing and repairs. And FMC says the citation was only issued because of the hazard that the worker might contact the energized portion of the air conditioner which were exposed because the cover plates had been removed.

The exception for "testing or repairs" contained in 30 C.F.R. 57.12-32 provides:

> Mandatory. Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

I disagree with FMC's view of the evidence. The FMC electrician was sodering at the top right portion of the unit (Tr. 9, P1). At that point the energized portion of the unit were below him and to the left (P1). The removal of the bottom cover plate appears completely unrelated and several feet from the sodering repair. I agree that the cover plate had to be removed after the sodering but it was removed in order to attach the high pressure hoses to the valves. But the FMC electrician indicated he could have locked out the equipment while he was doing the welding, then reenergized it, and thereafter checked the pressure (Tr. 20). These circumstances render 30 C.F.R. 57.12-32 inapplicable.

FMC cites Bill's Coal Company, 1 MSHC 2088 (1979), a decision by Judge Forrest Stewart which involves a "testing or repairs" regulation similar to the one relied on by FMC. In that decision a cover plate had been removed in order to replace a drive motor. Judge Stewart vacated the citation as he concluded that the repair exception applied. This pivitol fact did not occur in the instant case. The record is clear: the electrician did not have to remove the cover plate to weld the lines (Tr. 13, 14, 15). It was more convenient to do so because after the welding was completed he could hook up the high side pressure valves and then test the unit.

Repondent has the burden of proving that an exception rather than a mandatory regulation is applicable. On this record FMC did not carry its burden.

FMC further contends that Section 57-12.16 is designed to protect workers from mechanical rather than electrical hazards. FMC bases this view on the grounds that the contested regulation does not refer to "circuits". And the succeeding regulation, Section 57.12-17, is designed to prevent electrical hazards.

A reading of Section 57.12-16 indicates it refers to "electrically powered equipment." An air conditioner would be such equipment. On the other hand Section 57.12-17 clearly refers to power circuits.

FMC's final argument is that its worker deenergized the air conditioner by use of the "off" switch which was always in view of the worker and 4 1/2 feet away from where he was sodering (Tr. 13-14).

No defense is presented. The regulation requires that the equipment be deenergized. Merely turning the air conditioning switch to "off" did not deenergize it. The unit remained energized at the points where the power entered the unit and at the top of the conductors (Tr. 18-20, P1).

The failure to deenergize the equipment establishes the violation.

The citation should be affirmed.

The parties raise no issue as the proposed civil penalty of $52. Considering the statutory criteria, 30 U.S.C. 820(i), I deem that the proposed penalty is appropriate.

Based on the foregoing findings of fact and conclusions of law I enter the following

ORDER

1. Citation 575950 and the proposed civil penalty of $106 are affirmed.

2. Citation 575955 and the proposed civil penalty of $52 are affirmed.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

FMC CORPORATION, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST OF CITATION PROCEEDINGS DOCKET NO. WEST 81-131-RM MINE: FMC
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. FMC CORPORATION, Respondent.	CIVIL PENALTY PROCEEDINGS DOCKET NO. WEST 81-234-M MINE: FMC

Appearances:

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for the FMC Corporation

Robert J. Lesnick, Esq., Office of
Henry C. Mahlman, Associate Regional Solicitor
United States Department of Labor, Denver, Colorado
for the Secretary of Labor

Before: Judge John J. Morris

DECISION

In these consolidated cases the FMC Corporation, (FMC), contests an order of withdrawal issued by the Mine Safety and Health Administration, (MSHA), for an alleged violation of Title 30, Code of Federal Regulations,

57.6-177. 1/ The Secretary of Labor, on behalf of MSHA, seeks to impose a civil penalty for the alleged violation.

All of the proceedings herein arise under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. (Supp III, 1979).

After notice to the parties a hearing on the merits was held in Green River, Wyoming on September 2, 1981.

FMC filed a post trial brief.

ISSUES

The issues are whether FMC violated the regulation and, if so, what penalty is appropriate.

SUMMARY OF THE EVIDENCE

Ammonium nitrate, (ANFO), a blasting agent, has the appearance and texture of BBs. The explosive is mixed with fuel oil (Tr. 5, 49). In its underground trona mine FMC explodes the ANFO with high velocity cap and dynamite. These serve as a primer. An 18 inch water bag acts as a stemming device (Tr. 6, 11, 44).

After the blast the area is mucked out. Roof bolts provide overhead protection (Tr. 6).

On the day of the inspection an MSHA representative found two misfires (Tr. 7, 8, P1, P2). Ignition wires were sticking out of one of the drilled holes. FMC washed out the misfire holes after the withdrawal order was issued (Tr. 9, P2).

The top hole: was shot "clear through" and both sides of the hole could be seen. No cap or primer could be seen. No cap or primer washed out (Tr. 9, 31, 39, 42-43, 50-51).

1/ The cited regulation reads:

57.6-177 Mandatory. Misfires shall be reported to the proper supervisor. The blast area shall be dangered-off until misfired holes are disposed of. Where explosives other than black powder have been used, misfired holes shall be disposed of as soon as possible by one of the following methods:

(a) Washing the stemming and charge from the borehole with water;
(b) Reattempting to fire the holes if leg wires are exposed; or
(c) Inserting new primers after the stemming has been washed out.

The bottom hole: detonation wires were sticking out. It could not be determined if the hole had fired. Only the blasting agent (ANFO) could be seen in the hole (Tr. 50-51).

The holes had been primed and fired on the swing shift the previous night. This was 11 hours before the inspection (Tr. 12, 15). The day shift foreman hadn't seen the misfires (Tr. 13).

In everyday use ANFO is as inert as cement. It is insensitive to friction, drop weight, and cap sparks. Shooting it with a bullet will not cause it to explode (Tr. 67, 68).

If over compacted, as from a blast, ANFO will desensitize (Tr. 68). But the compaction of ANFO to the point of being inert cannot always be determined (Tr. 70, 74).

DISCUSSION

MSHA's witness defines a misfire as a drilled hole loaded with explosives which did not fire on the initial detonation (Tr. 27).

The Secretary's definition in Title 30, Code of Federal Regulations, Section 57.2 states:

> Misfire means the complete or partial failure of a blasting charge to explode as planned.

The facts here establish a violation of the regulation. Both the top and bottom holes had misfired.

The misfire in the top hole was somewhat more obscure than the bottom hole since it had "shot through," that is, the hole on the back side of the blast would indicate that the primer and cap had exploded (Tr. 27). No evidence was presented as to precise appearance of a drill hole after it is "shot through".

The misfire in the bottom hole was more readily apparent since the detonation wires were still hanging out of the hole after the blast (Tr. 39, P2).

The presence of ANFO, the explosive, in the drill hole after the blast, fairly indicates at least a partial failure of the blasting charge. It accordingly falls within the definition of a misfire.

CONTENTIONS

FMC contends that no misfire occurred, further, the drill holes contained only ANFO, and, finally, that even if a violation occurred the proposed civil penalty is excessive.

FMC's initial contention is that the drill holes observed by the MSHA inspector were not misfires. This position evolves in this fashion: 30 C.F.R. 57.6-8 [2]/ and 30 C.F.R. 57.6-190 [3]/ refer to ammonium nitrate as blasting agents therefore ammonium nitrate is not a "blasting charge" as contemplated in the regulatory definition of a misfire.

FMC correctly observes that the term "blasting charge" is not defined in the regulations. However, a common definition in a mining dictionary is that a "charge" is the explosive that is loaded into the borehole for blasting.[4]/ In short, the charge is the total explosive package. In this case it includes the primer, the ammonium nitrate, and the dynamite.

FMC places considerable reliance on the fact when the drill holes were washed out no cap or primer were observed. Therefore, it concluded the holes contained only ANFO.

FMC's view of the evidence is based on hind sight. With the wires sticking out of the bottom hole a strong possibility of a misfire existed. It is true that no cap or primer were found in either hole but one cannot ignore the fact that some of the material in the hole was originally a part of the explosive charge. FMC aptly states that the obvious purpose of 30 C.F.R. 57.6-77 is to avoid the possibility of an unplanned detonation of a live charge. In short, what appears to be a misfire should be treated as a misfire.

FMC also argues that any ANFO in the drill hole would have been inert after an explosion. Therefore, it presented no hazard.

2/ 57.6-8 Mandatory. Ammonium nitrate-fuel oil blasting agents shall be physically separated from other explosives, safety fuse, or detonating cord stored in the same magazine and in such a manner that oil does not contaminate the other explosives, safety fuse, or detonating cord.

3/ Sensitized Ammonium Nitrate Blasting Agents
All of the standards in this § 57.6 in which the term "explosives" appears are applicable to blasting agents (as well as to other explosives) unless blasting agents are expressly excluded.

General -- Surface and Underground

57.6-190 Sensitized ammonium nitrate blasting agents, and the components thereof prior to mixing, should be mixed and stored in accordance with the recommendations in Bureau of Mines Information Circular 8179, "Safety Recommendations for Sensitized Ammonium Nitrate Blasting Agents," or subsequent revisions.

4/ A dictionary of Mining, Mineral, and related terms, United States Department of Interior, 1968.

I disagree. The evidence establishes that it is impossible to tell when and if a blast has compacted ANFO to a point where it becomes inert (Tr. 70, 74).

The nexus of this violation lies in the fact that an unplanned detonation could have occurred had a cap, or a primer, or ANFO exploded after the initial firing. The possibility of this occurring establishes that a misfire exists. This in turn mandates the remedial action contained in Section 56.9-177.

FMC cites Day Mines, Inc., 2 FMSHRC 1720, (1980), and Mulzer Crushed Stone Company, 2 FMSHRC 2497, (1980). While these cases involve the regulation in contest Judges Koutras and Moore did not address the issues raised here.

CIVIL PENALTY

The Secretary seeks to impose a civil penalty of $1000 for this violation.

FMC asserts that the penalty is excessive. I agree. While the gravity is severe the negligence is low. In the only the prior citation against FMC involving a misfire the inspector wrote up the citation as one involving unexploded materials (Tr. 84). Further, in this case MSHA issued the citation at 11 a.m. and the abatement was accomplished 11:23 a.m. (Tr. 18, Citation). This would indicate rapid abatement after notification of the violation.

Considering the statutory criteria, 30 U.S.C. 820(i), I deem that a penalty of $200 is appropriate.

Based on the foregoing findings of fact and conclusions of law I enter the following order:

1. Citation 577230 is affirmed.

2. A penalty of $200 is assessed.

3. The contest of Citation 577230 filed by respondent is dismissed.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. HOMESTAKE MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. CENT 80-140-M A/C No. 39-00055-05022 W MINE: Homestake

UNITED STEELWORKERS OF AMERICA, LOCAL UNION 7044, DISTRICT 33, Complainant, v. HOMESTAKE MINING COMPANY, Respondent.	COMPLAINT FOR COMPENSATION DOCKET NO. CENT 80-198-CM MD 79-107 Through 125 MINE: Homestake

DECISION

Appearances:

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Before: Judge Virgil E. Vail

JURISDICTION AND PROCEDURAL HISTORY

On June 21, 1979, an inspector employed by the Mine Safety and Health Administration (hereinafter MSHA) issued an order of withdrawal for the

Ross shaft area from the collar to the 4500 foot level of the Homestake Mine of the Homestake Mining Company (hereinafter Homestake). The order of withdrawal was issued pursuant to section 103(k) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 813(k) (hereinafter the Act), based upon the inspector being told by Homestake officials that there was smoke in the Ross shaft area.

On August 22, 1979, a special inspection was conducted by MSHA at the Homestake Mine and citation No. 329655 was issued to Homestake pursuant to section 104(a) of the Act (30 U.S.C. § 814) alleging that Homestake had worked miners in the Ross shaft area in violation of the 103(k) withdrawal order issued on June 21, 1979. On February 6, 1980, Local Union No. 7044, District 33, of the United Steelworkers of America (hereinafter USWA) filed a complaint for compensation under section 111 of the Act (30 U.S.C. § 821) for its members who are employees of Homestake. On February 19, 1980, MSHA filed a proposal for assessment of a civil penalty pursuant to section 105 and 110 of the Act (30 U.S.C. § 815 and 820). On March 20, 1980, Homestake filed an answer to MSHA's proposal for assessment of a penalty. On October 30, 1980, Homestake filed a motion for summary decision alleging that USWA's complaint for compensation was untimely filed and an answer denying miners were required to work in areas of the mine covered by the 103(k) order. On November 28, 1980, an Order was issued denying respondent's motion for summary decision based upon a showing by USWA of good cause for its delay in this matter.

These two cases were consolidated pursuant to Procedural Rule 12 of the Federal Mine Safety and Health Review Commission, 29 C.F.R. § 2700.12 and a hearing was held in Lead, South Dakota. All three parties filed post hearing briefs.

ISSUES

1. Whether Homestake, having previously failed to seek administrative review of 103(k) order issued by MSHA is now foreclosed from contesting validity of the order in a 104(a) penalty proceeding and a section 111 compensation proceeding.

2. Whether Homestake worked miners in violation of a 103(k) order on June 21, 1979, as charged by MSHA and, if so, the amount of the civil penalty which should be assessed?

3. Whether Homestake employees were forced to work in areas of the mine in violation of the 103(k) order and, if so, whether they are entitled to compensation under section 111 of the Act and, if so, the amount of compensation which they are entitled to receive?

4. Whether Homestake employees who reported for work on June 21, 1979 at 6:00 a.m. and were subsequently released from duty at 11:00 a.m. as a result of the 103(k) withdrawal order are entitled to compensation under

section 111 of the Act in addition to the four hours show-up pay provided for in Article 5, Section C(1) of the collective bargaining agreement between Homestake and employees.

APPLICABLE LAW

Section 103(k) of the Act, 30 U.S.C. § 813(k) (Supp. 111, 1979), provides as follows:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 C.F.R. § 50.2(h) defines an "accident" as pertinent herein as follows:

> (6) An unplanned mine fire not extinguished within 30 minutes of discovery.

Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(a) (Supp. III, 1979), provides as follows:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

Section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 821, (Supp. III, 1979), provides in part as follows:

> If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or

section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. ... Whenever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5, United States Code.

STIPULATIONS

Homestake and the Secretary stipulated the following:

1. Homestake is the operator of the Homestake Mine.

2. Homestake is subject to the jurisdiction of the Federal Mine Safety and Health Act.

3. The Administrative Law Judge has jurisdiction over this proceeding.

4. Homestake is a large gold mine operator.

5. Homestake's ability to continue in business after imposition of a reasonable civil penalty is not at issue.

6. The citation at issue was properly served on Homestake.

7. Homestake exhibited good faith in abating the contested citation or order.

8. Homestake's history of previous violations will be reflected by MSHA's computer print-out of past violations subject to review and concurrence by counsel for Homestake.

9. USWA and Homestake stipulated to the identity of the miners, hourly wage rates, and work assignments relative to the 103(k) order issued on June 21, 1979 as set forth in Appendix "A" attached hereto and incorporated herein.

SUMMARY OF THE EVIDENCE

Homestake is a large gold mine located in Lead, South Dakota, the deepest level being 8000 feet underground. The mine has three distinct ventilation systems including three air intake and two exhaust shafts. The Ross and Yates shafts, located approximately one-half mile apart and descending parallel from the surface collar to the 4550 foot level are the two main access, hoisting, and ventilation shafts.

At the start of a working shift and preparatory to going underground, miners walk to and assemble in the "ramp" which is an area constructed of concrete and steel located approximately 20 feet below the surface collar.

The first working level located 100 feet below the surface collar of the Ross and Yates shafts is a haulage-way called a tramway. Ore is hoisted up the shafts and dumped in crushers and bins located in the tramway to be later hauled along the tramway to the mill. The tramway runs partly underground and partly above ground with a portion covered by a snowshed for protection from the weather. The tramway is open at both ends to the atmosphere and is not dependent upon the ventilation systems served by the Yates and Ross shafts. Doors are installed at the entrances to the shafts to prevent intake of air from the ventilation system to enter the tramway or air from the tramway to enter the shaft. The tramway runs approximately 300 yards underground at the 100 foot level from the Ross shaft to the first open portal or open surface area and connects with the tramway from the Yates shaft and continues on to the mill which is located above ground.

On June 21, 1979, at 6:00 a.m., miners being lowered in the Ross shaft to commerce working the day shift reported the smell of wood smoke from the 2000 foot to the 4500 foot level. Sam Grover, acting safety director for Homestake, was notified of the smoke and called Earl Phelps of the safety department at approximately 6:10 a.m. to go underground to investigate. Phelps rode the man-cage down the Ross shaft checking for "bad air" with a Drager tester. Phelps testified that CO (carbon monoxide) was not detected in the shaft until he reached the 2150 foot level where he got out of the man-cage and conducted several tests. A level of CO at the 2150 foot level

at 6:25 a.m. was tested at 90 parts per million. Larry Issac, a miner who had been lowered before Phelps, reported that the smell of wood smoke was stronger on the 2600 foot level than it was on the 2150 foot level. Phelps reported this information to Sam Grover and it was decided not to lower any more miners and that those miners who had previously been lowered would be taken out of the mine. Phelps continued on to the 2600 foot level and tested for CO finding 90 parts of CO per million at that level but further testing at the 4800 and 5000 foot levels revealed only traces of CO. Phelps continued checking areas until 9:30 a.m. at which time he returned to the surface. The miners who had been lowered earlier were all removed from underground by 7:30 a.m.

Ray Smith, mine superintendent, was in the ramp area of the Ross shaft at 6:10 a.m. when the report of the smell of wood smoke in the shaft was received and remained in that area until 10:30 a.m. Smith testified that he had several conversations with the miners assembled in the ramp area to keep them informed as to the results of the investigation into the cause of the smoke. At 7:00 a.m. an announcement was made by authority of Ray Smith, to the miners assembled in the Ross shaft ramp area that any miner who chose to could go home and would receive four hours show-up pay as provided in the Union's contract with Homestake. It was also announced that management thought the mine would be cleared of smoke during the day-shift and that the miners would be allowed to go to their regular working places. A few miners left at this time and some left later on in the morning, the exact number being unknown.

At approximately 9:15 a.m., the remaining miners were told to report to their bosses for reassignment to other jobs. Three bosses were selected for clean-up in the tramway area and three for clean-up around the headframe and the miners remaining in the ramp area were assigned to these bosses. It took approximately 15 to 30 minutes to assemble the miners and take them to their respective job assignments. At 11:00 a.m., the miners from the Ross shaft area who were not allowed to work at their regularly assigned locations and duties were released to go home. This was the end of the four hour show-up period.

At 7:30 a.m., on June 21, 1979, Dallas Tinnel, president of local union 7044 of USWA at Homestake telephoned the MSHA office in Rapid City, South Dakota to report high levels of CO and smoke in the Ross shaft of the Homestake Mine. At 8:10 a.m. on the same day, Sam Grover telephoned MSHA's office and made a similar report. At 10:00 a.m., MSHA inspectors William Donley, Wayne Lundstrom, Guy Carstens and Jeram Sprague arrived at the mine to investigate the reported incident.

A meeting betweeen MSHA inspectors and members of Homestake's management was held in the map room of the mine office at which time a discussion occurred as to what Homestake's management had determined was the cause of the CO and smoke in the Ross shaft area. Management stated that there were concentrations of CO from the 2150 foot level to the 4500 foot level of the Ross shaft and that a sizeable VCR (vertical crater retreat) blast had been set off at the 4243 D stope, 9 ledge 4700 level at the end of the night shift at approximately 3:30 a.m. on June 21, 1979. Homestake's management was of the opinion that the wooden spacers used in the VCR blast had ignited and was the source of the wood smoke smell which the miners on the day shift encountered as they were lowered in the shaft and that this "bad air" was being exhausted outside through the ventilation system. Inspector Donley asked of management if they had positively determined that the VCR blast was the cause of the CO and smoke. Members of management stated that they could not be certain but they were reasonably certain that there was not a fire in the mine.

At 10:12 a.m., following the above discussion and upon an order from supervising inspector Donley, inspector Lundstrom issued 103(k) order No. 329637 1/ which states as follows:

> High concentration of CO in Ross shaft from collar to 4500' level. All persons except Company officials, MSHA personnel and Union representatives are not allowed in the area until an investigation has been made to determine the concentration of CO and other gases.

Following further discussions with management, Donley instructed Lundstrom to insert the word "area" after the words "Ross shaft" in the order and told them he would exclude the Ross shaft itself from the 103(k) order so that the shaft could be used to lower men and materials if it was necessary to fight a fire. Donley further explained to management that areas below the 4500 foot level of the Ross shaft and all of the Yates shaft were not to be included in the order based upon information from management that there was no evidence of CO or smoke in those areas. The tramway was never discussed at this meeting.

After the 103(k) order was issued, the MSHA inspectors, miners and management representatives went underground and inspected the various levels of the Ross shaft from the 4100 to 4850 foot levels taking various readings for air contaminants. Based upon this inspection, the 103(k) order was terminated at 1:45 p.m. on June 21, 1979. A meeting was held at the mine on the following day, June 22, 1979, between MSHA inspectors and Homestake's management to discuss the procedures followed by Homestake the day before.

1/ Exhibit P-1.

On August 21, 1979, Donley received a telephone call from Tinnel requesting MSHA investigate complaints of miners that they were forced to work on June 21, 1979 in violation of the 103(k) order. Donley and Lundstrom met with Tinnel and several miners that day and on the following day, August 22, 1979, Citation No. 329655 was issued to Homestake alleging a violation of section 104(a) of the Act and alleging as follows:

> On June 21, 1979, Homestake officials worked approximately 30 men in violation of a 103(k) order number 329637 issued 10:12 hours June 21, 1979. 2/

This citation was terminated immediately as the condition complained of no longer existed.

DISCUSSION

The first issue to be addressed is whether Homestake, having previously failed to seek administrative review of the 103(k) order issued on June 21, 1979, is now precluded from contesting the validity of the order in the subsequent 104(a) citation and section 111 compensation proceedings?

All of the parties herein contend, and I must concur, that there is no specific provision, either in the Act or the Commission's Rules of Procedure, 29 C.F.R. Part 2700, setting forth what procedures should be followed in contesting a 103(k) order, be it administrative or otherwise. Other sections of the Act do specifically provide for administrative review. Under section 105, 30 U.S.C. § 815(d), an operator may contest a citation or order issued pursuant to section 104 of the Act and orders issued under section 107 of the Act before the Federal Mine Safety and Health Review Commission (hereinfater the Commission), pursuant to the language of section 107 itself. 3/

2/ Exhibit 2

3/ 30 U.S.C. 2700.20 of Commission rules states as follows:

... (a) Section 105(d) of the Act, 30 U.S.C. § 815(d), provides, in part: If within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104 ... the Commission shall afford an opportunity for a hearing ... .

30 U.S.C. 2700.21 Commission's Rules provides as follows:

... (a) When to file an application for review of an order of withdrawal issued under section 107 of the Act, 30 U.S.C. § 817, ... shall be filed within 30 days of receipt by the applicant of the order sought reviewed ... .

Homestake argues that the reason there is no mention in the Commissions Rules of a procedure for review of a 103(k) order is that such an order does not entail or contemplate the issuance of a citation or proposal for a penalty. I reject this argument as there are more than a few cases reported up to the present time in which both the 103(k) order and either a citation or compensation proceeding followed. Harman Mining Corporation v. Secretary of Labor, ___ F. 2d _____ (4th Cir. 1981)(Unpublished), Secretary of Labor v. Miller Mining Co., Inc., Docket No. WEST 81-267-M, (August 1982), Secretary of Labor v. B & N Construction, Inc., Docket No. WEST 80-226 and 260-M (1981).

The Secretary argues that Homestake failed to raise this issue in its July 3, 1980 prehearing statement and should not be allowed to raise it at this time. He also contends that Homestake is precluded from raising the validity of the order in a 104(a) proceeding having failed to do so prior to its issuance and cites as its authority therefore C F & I Steel Corporation v. Morton, 516 F. 2d 868, 871-872 (10th Cir. 1975).

USWA argues that Homestake was required to raise the validity of the 103(k) order within 30 days of its issuance for the reason that the Commission Rules provides time frames of 30 days to contest other orders. It suggests that although such references do not specify such 30 days for a 103(k) order, a time frame should be no more or less than those established for all other orders under the Act.

I reject all of these arguments as there appears to be no doubt that the operator has a right to administrative appeal of a 103(k) order. In the case of American Coal Company v. United States Department of Labor, 639 F. 2d 659, (Tenth Cir. 1981), the Court considered the fact that there was no provision within the Act for administrative review of the 103(k) order but concluded such a right existed and stated as follows:

> We do not believe, however, that merely because 30 U.S.C. § 813(k) makes no specific references to administrative review, such omission means that there is no administrative review. A reading of the entire Act, coupled with its legislative history leads us to conclude that the action taken ... under 30 U.S.C. § 813(k)(section 103(k)) was subject, first to administrative review, with final action by the Review Commission to then be subject to judicial review in the appropriate Court of Appeals under 30 U.S.C. § 816.

The Commission in the case of Secretary of Labor v. Eastern Associated Coal Company, Docket No. HOPE 75-699 (1980), considered the right to appeal an order issued under section 103(f) of the Coal Act of 1969, 30 U.S.C. § 801 et seq. (1976)(Amended 1977), which is the statutory predecessor to section 103(k) of the 1977 Act. The Commission concluded that there was no

express provision precluding a review of such order and agreed with the Board of Mine Operators conclusion that the Interior Secretary had established an administrative adjudication system for review of 103(f) orders and further concluded that the Commission succeeded to the Interior Secretary's powers to adjudicate the cases under consideration relating to this section.

That Homestake has a right to contest the validity of the 103(k) order issued on June 21 1979, appears clear from the decisions in the American Coal and Eastern cases. However, neither case addressed the question of when such an appeal must be commenced or whether its validity would be precluded from being raised in a subsequent case involving a 104 citation or a compensation proceeding. The Secretary cites the Court's decision in CF&I Steel Corporation v. Morton, 516 F. 2d 868, 871-872 (10th Cir. 1975), as authority for his argument against Homestake raising the issue. This case arose under the 1969 Coal Act and is distinguishable from the present case in that the withdrawal order in the CF&I case was issued under section 104(a) of the Act and provision is made under the Act requiring that administrative review of such order must be obtained under provisions of section 815 prior to the expiration of 30 days of the issuance or modification of such order. I find that there is a distinguishing feature between 103(k) orders and those contemplated under section 104 and 107 of the Act. The 107 order is issued in the event of an imminent danger occurring in the mine which may or may not give rise to a subsequent citation and proposal for a penalty against the operator. Usually a citation is included as part of the basis for issuing orders under section 104 and 107 of the Act. In those cases involving accidents, section 103(k) provides for the issuance of orders "... as appropriate to insure the safety of any person in the coal or other mine ... ." (emphasis added). The issuance of citations as a result of such an occurrence, if such arises, usually would come later. The Commission in the Eastern case in footnote No. 6 stated as follows:

> ... the philosophy of review of both the 1969 and 1977 Acts is that operators are to comply with administrative orders first and litigate their merits later ... .

This philosophy is most appropriate when applied to those situations involving accidents in the mines. It follows that an operator should not be expected to file for an administrative review of the order until he has been notified that the Secretary believes that a violation occurred in connection with the accident which gave rise to the order. Prior to the notice or issuance of a citation, the operator would not likely have cause for requesting a review and only after such notice or issuance of a citation and anticipation of a proposal for a penalty does the validity of the order become material. Also, the very same evidence involved in the

validity of the order may be material to consideration of the citation although the basis for the issuance of the order is sacrosanct. I therefore conclude that Homestake had the right to have the validity of the 103(k) order reviewed in the present 104(a) citation and compensation proceeding. I also find that the general denial in the respondent's answer raises this issue. All the parties at the hearing and in subsequent post-hearing briefs were given ample opportunity to present evidence on this matter and argue the law and facts as pertinent therein.

Having concluded that Homestake has the right to administrative review of the 103(k) order in this case, the next question is whether or not such order was valid.

Homestake argues that the 103(k) order was vague and indefinite and that it was erroneously issued because there was neither an "accident" or an "unplanned fire" as contemplated in the Act.

I reject Homestake's arguments and find that there was a valid basis for issuing the 103(k) withdrawal order on June 21, 1979. The pertinent portion of 103(k) of the Act provides that in the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary may issue such orders as he deems appropriate to ensure the safety of any person in the coal or other mine. (30 C.F.R. § 813(k). It is apparent that this section is broad enough to permit the closing of any section of or the whole mine upon the occurrence of an accident, if under the circumstances it is deemed appropriate. The Secretary's regulations at 30 C.F.R. Part 50 provides several definitions of an accident. The one applicable here is section 50.2(h)(6) which states in part as follows:

> Accident means,
> . . . .
> An unplanned mine fire not extinguished within 30 minutes of discovery.

Homestake contends that the evidence of record does not establish that there was an accident on June 21, 1979 within the meaning of the Act and that the "bad air" detected in the mine was a result of the VCR blast which was planned and set off at the end of the night shift. On the other hand, the Secretary contends that there was an accident which warranted the inspector issuing the order of withdrawal. He relies on the fact that the inspectors upon arriving at the mine over 6 hours after the VCR blast were informed by Homestake management that they had found high concentrations of CO in the amount of 90 parts per million on the 2150 level and that they were not certain as to the cause although they believed it was a result of the VCR blast.

A reasonable assessment of the facts known by Homestake at 6:30 a.m. prompted management to withdraw the miners from the Ross shaft that morning. Further, as late as 10:00 a.m. when the inspectors arrived,

Homestake management had not made a positive determination as to the cause of the CO and smell of wood smoke in the shaft. Based on these facts, it is reasonable for the inspectors to believe there were grounds to issue the 103(k) order for the health and safety of the miners. If subsequent investigation revealed that the condition causing the CO and smoke in the shaft had abated, this would not make the original decision wrong. However, the facts support the conclusion that the results achieved by Homestake with their VCR blast were unplanned and that it was not correctly determined within 30 minutes of the blast that a fire did not exist. The evidence established that thousands of board feet of pine spacers were used in the blast and this could have caused the wood smell and CO in the shaft. It is clear to me that section 103(k) of the Act clearly authorized the inspectors to issue the order of withdrawal on June 21, 1979. The plain language of this provision of the Act and related regulations authorizes respresentatives of the Secretary to issue such orders as they deem necessary to protect the health and safety of the miners. As the conditions existed at the time of the inspectors arrival at the mine, a prudent reading of the potential perils warranted the action taken in issuing the order and conducting the subsequent inspection of the affected area. Until the inspectors could be assured there was no further danger to the miners from a fire or CO, the issuance of the 103(k) order was valid and proper.

The next question to be considered in these two cases is whether Homestake worked miners on June 21, 1979 in violation of the 103(k) order. To resolve this issue, a determination must be made as to the scope of the area of the mine intended to be covered by such withdrawal order.

Homestake argues that the order was vague and indefinite as to the area of the mine that MSHA inspectors intended to have miners withdrawn from. A review of the evidence shows that the order was issued at 10:12 a.m. in the map room of the mine office. Charles Tesh, mine production superintendent testified that he was present and had a discussion with the inspectors when the order was written and it initially stated that the area to be closed was "The Ross shaft." Tesh told the inspectors that this created many problems, including being unable to make ambulance runs from the 4500 foot level to the surface which might be necessary as the other areas of the mine were operating. Also, Tesh argued that if the shaft was totally shut down Homestake would be unable to bring materials into the mine. Further, that the Ross shaft was a fresh air intake system and there were no contaminants in the shaft itself. He testified that the inspectors then offered to modify the order by inserting the word "area" after the word shaft which would allow Homestake to continue to use the hoist. Homestake agreed to this and the order was so modified. Tesh testified that from this discussion, he understood that once the inspector inserted "area" into the 103(k) order, that the Ross shaft itself was not closed and only the area between the 2150 and the 4550 was closed. He recalled no discussion regarding the tramway, although he knew men were working there. Allen S. Winters, general mine manager, was present at this meeting and

testified that following the issuance of the order, he explained to Ray Smith that it covered the Ross shaft down to the 4500 foot level and from the outer stations where they T off to the various drifts.

The Secretary contends that the order as written was clear as to its meaning by reason of common usage of the terms in the body of the order and rejects the arguments of Homestake that the order was vague.

A careful review of all of the testimony convinces me that the members of Homestake's management and inspectors fully discussed the areas intended to be covered by the order at the meeting in the map room of the mine office and resolved whatever differences they had or anticipated from such closure at that time. All of the witnesses agreed that the tramway was not discussed at this time. Inspector Donley was familiar with the various areas of the mine as his testimony was that he had started inspecting the Homestake mine in 1972. Also, various members of Homestake's management testified that they knew men were working in the tramway when the order was issued and did not discuss the consequences of this in relationship to the scope of the order.

In view of the above, either the parties to the discussion of the area to be covered by the order at the time of its issuance did not consider the tramway a part of the Ross shaft or did not consider that area to be potentially hazardous to the health and safety of the miners working there. The tramway by description, as deduced from the evidence of record, is, distinguishable from the drifts that connect with the Ross shaft at the various levels. It is located 100 feet under the collar and runs approximately 300 yards underground in the area of the Ross shaft. However, the tramway runs both underground and on the surface and also connects with the Yates shaft. Its source of air supply is independent of the Ross shaft which receives its air from the outside through its portals. Winter described the tramway as a tunnel that begins on the north side of the mountain and travels through to the south side with doors that are kept closed at the Ross shaft so that fresh air from the outside does not enter the shaft from the tramway. He stated that traditionally he did not consider the tramway a part of the mine.

Based upon the above testimony and all of the other evidence of record I find that the tramway as located and utilized in the Homestake mine was not understood to be covered by the order as issued on June 21, 1979 and it was not a violation of the 103(k) order to work miners therein. I am persuaded by the evidence that it was not just a mistake that the tramway was not discussed at the meeting in the mine office when the order was issued but rather was not a concern to the parties at that time. Further, there is no evidence that any danger existed to the miners in the tramway area from the CO or smoke in the Ross shaft. Therefore, I find Homestake did not violate the 103(k) order when it continued to work the tramway crew after the order was issued or assigned miners to clean-up in the tramway area June 12, 1979. Citation No. 329655 is hereby vacated.

The remaining question to be decided is whether the Homestake employees who showed up for work on June 21, 1979 at 6:00 a.m. and were subsequently released at 11:00 a.m. are entitled to compensation under section 111 of the Act for the balance of their shift in addition to the four hours show-up pay provided for in their collective bargining agreement.

A review of the evidence shows that the facts are not in dispute as to this issue. On June 21, 1979, at approximately 6:00 a.m. the miners assigned to work in the Ross shaft area arrived at the ramp area to prepare to go to their designated work areas. Due to the smell of wood smoke and CO in the Ross Shaft, the miners who had been lowered were removed and the remaining miners were not allowed to enter the mine. After an investigation of the cause of the CO in the shaft, Homestake made a determination that the miners would be assigned to other work duties until 11:00 a.m. and then sent home. Homestake paid the miners four hours of show-up pay in accordance with the provision of their collective bargaining agreement with the USWA.

Charles Tesh testified that the miners in the ramp area that morning were kept advised of the progress being made by Homestake in investigating the "bad air" in the shaft and that a decision was made by management and announced by Tesh to the miners at 8:53 a.m. that they would be assigned to crews for work in the tramway and headframe areas and would be sent home at 11:00 a.m. The evidence further shows that the miners were assigned to the work crews and arrived at their various assigned areas around 10:00 a.m. or shortly thereafter. The 103(k) order was issued at 10:12 a.m.

A careful review of section 111 of the Act and prior decisions of the Commission support the position of the USWA herein. The first sentence of section 111 of the Act reads as follows:

> If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled but for not more than the balance of such shift. *** (Emphasis added).

The purpose of the above section is to provide limited compensation solely for regular pay lost because of the issuance of an order designated in that section.

Homestake argues that it had informed the miners prior to the time the order was issued that concentrations of gas in the affected area of the mine had exhausted and they could go back to work. However, the miners

were uncomfortable about the situation and did not want to go to work in that area of the mine. Homestake then made the decision between 8:30 a.m. and 9:00 a.m. not to have the miners return to the affected area but to pay the miners 4 hours show-up pay. Homestake argues that the decision in UMWA v. Eastern Associated Coal Corp., 3 FMSHRC 1175 (May 11, 1981) applies. I find a distinction exists between the situation in the present case and that which occurred in Eastern, supra, wherein the miners had withdrawn from the mine prior to the issuance of an order to observe a memorial period which the union had contracted for. In the case involved here, the Homestake miners were idled by the same condition which led to the issuance of the order, i.e., the smoke and CO in the shaft on June 21, 1979. There was therefore, a clear "nexus between the underlying reasons for the idlement and pay loss and the reason for the order". Id at 1178. The reason for the issuance of the withdrawal order was the existence of the "exigent or emergency conditions" created by the conditions in the Ross shaft portion of the mine. Id. at 1178.

Homestake also argues that the miners were not idled by the order, but rather a mutual decision was made between management and the miners to not return to production prior to the issuance of the order. They cite Royal Coal and Cowin and Company, Inc., 2 FMSHRC 1738, (July 7, 1981) and contend that this supports their position that miners are entitled to compensation only if they are "idled by" such an order and that in the instant case, the miners were not idled by the order as they were assigned to other areas of the mine and working therein when the order was issued.

The argument above misses the mark in that the claim herein for compensation does not cover the period when the miners were working at the tramway and head frame. It is for the balance of the shift after the miners had put in their four hours and were sent home. The decision in the Royal Coal case, supra. supports the USWA argument. The decision states:

> Royal and Cowin concede that the miners idled in the shift in which the order was issued are entitled to full compensation for the balance of that shift at their regular rate of pay ... The dispute over compensation here at issue concerns the second part of section 111. ***

The claim in the instant case is similar to the facts in the case of UMWA v. Old Ben Coal Company, 3 FMSHRC 2793, (December 7, 1981) where a fire occurred at approximately 7:30 a.m. in the "A" shaft and miners were immediately withdrawn. At 8:15 a.m. an inspector for MSHA issued a 103(k) withdrawal order. At 12:45 p.m. the order was modified to allow rehabilitation of the area and to resume normal operations. The afternoon shift worked their full shift for that day but the morning shift was paid

four hours reporting pay pursuant to the USWA contract. The operator in above case raised the same arguments as Homestake does in this case and the Judge found such arguments without merit and stated as follows:

> In the legislative history accompanying section 111 Congress made clear "... miners should not lose pay because of the operator's violation, or because of an imminent danger which was totally outside their control." (Emphasis added). S. Rep. No. 95-181, 95th Cong. 1st Sess. 46-47 (1977), in Legislative History of the Federal Mine Safety and Health Act of 1977, at 634-635. ***

Homestake's argument that they voluntarily withdrew the miners before the 103(k) order was issued, and therefore the miners were not withdrawn by the order and should not have compensation under section 111 is rejected. In Clinchfield Coal Co., 1 IBMA 31 (1971), the former Board of Mine Operators Appeals rejected a similar argument and said that

> ... [r]egardless of the sequence of the events or the method by which the miners were originally withdrawn, a mine, or section thereof, is officially closed upon the issuance of an order pursuant to 104, and the miners are officially idled by such order.

In this proceeding, the miners were working at other jobs when the 103(k) order was issued at 10:12 a.m., but they were officially idled by the order when they were sent home at 11:00 a.m. Those 117 miners listed in Item 4, page 2, 3 and 4 of the stipulation entered into between Homestake and USWA are entitled to full compensation for the balance of their shift at their regular rate of pay, which pay is in addition to the show-up pay they received for the first four hours.

The USWA failed to request interest in either their petition for compensation, or at the hearing, or in their briefs. However, the Commission considered this situation in Peabody Coal Company v. Secretary of Labor and UMWA, 1 FMSHRC 1785 (November 14, 1979) and stated as follows:

> Furthermore, to deny interest would be to award the miners less than the full compensation mandated by section 110(a).

Although the Peabody case, supra, concerned the 1969 Act, the application of this provision is the same as section 111 in this instance. In that case the Commission awarded interest at the rate of six percent per year from the date compensation was due to the date payment was made. However, I find it more reasonable at this time to award interest at the rate of 12 percent per year from the date compensation was due to the date payment is made. This is in accordance with the "make whole" policy of the Act to

award interest on the sums due miners from the date of idlement to the date of payment. UMWA v. Youngstown Mines, 1 FMSHRC 990 (August 14, 1979); UMWA v. Beatrice Pocahontas Co., 3 FMSHRC 2004, 2013 (August 27, 1981); Johnny Howard v. Martin Marietta Corp., 3 FMSHRC 1876 (July 31, 1981); UMWA v. Old Ben Coal Company, 3 FMSHRC 2793 (December 7, 1981). The decision that 12 percent interest, rather than 6 percent awarded in Peabody is based upon a realistic view that the rate of interest has risen to new levels within the past year and even at that rate is below the rate of interest in most commercial transactions.

CONCLUSIONS OF LAW

Based upon the entire record in these two cases, and consistent with the findings embodied in the narrative portion of this decision, the following conclusions of law are made:

(1) The Commission has jurisdiction to hear and decide this matter.

(2) Homestake, having previously failed to seek administrative review of the 103(k) order, is permitted to contest the validity of the order in a 104(a) penalty proceeding and a section 111 compensation proceeding filed as a result of such order.

(3) Homestake did not violate the 103(k) order by working miners in the tramway for the reason that it was not within the scope of the order.

(4) The 117 miners identified in section 4, pages 2, 3, and 4 of the stipulation entered into between USWA and Homestake (Addendum A) are entitled to full compensation at their regular rate of pay for the balance of such shift in addition to the show up pay they received for the first four hours.

(5) In addition to the above, the 117 miners are entitled to interest on the balance of pay they are due at the rate of 12 percent from the date the compensation was due to the date payment is made.

ORDER

WHEREFORE, for the reasons herein before given, it is ordered:

(A) That Citation No. 329655 issued on August 22, 1979 is hereby vacated.

(B) The complaint for compensation filed on February 6, 1980, is granted, only in part, as it pertains to those 117 miners listed in section 4, pages 2, 3, and 4 of the stipulation (Addendum A), and Homestake is

ordered to pay the 117 miners listed therein, within 40 days from the date of this decision, full compensation at said miners regular rate of pay for the period described as the balance of such shift. The compensation shall be paid with interest at 12 percent per annum from June 21, 1979, to the date of payment.

Virgil E. Vail

Virgil E. Vail
Administrative Law Judge

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UNITED STEELWORKERS OF AMERICA LOCAL 7044, DISTRICT 33, Petitioner, -vs- HOMESTAKE MINING COMPANY, Respondent.	)	Docket No. CENT 80-198-CM MSHA Case No. MD 79-107 through 125 Homestake Mine

STIPULATION

The undersigned representatives of the above captioned parties, pursuant to a stipulation entered on the record at the close of the hearing held in the above captioned matter, hereby submit the following written stipulation for the Court's consideration:

1. The following employees of Respondent did work their full and normally assigned shift on June 21, 1979, as the "normal tramway crew" in Homestake Mine, with the tramway being shown on exhibits which were entered at the time of hearing. These employees reported to work at the Yates Shaft work area and are as follows:

Miners Submitting Complaint For Compensation	Hourly Wage Rate June 21, 1979
James Vitel	$ 7.55
Linda Washburn	$ 7.55
Robert Ford	$ 7.55
Gary Rath	$ 7.55

2. It is further agreed that the exact amount of time that the above named employees were in fact performing their work duties in the allegedly affected area of the 103 Closure Order, which is the subject of this litigation, cannot be exactly calculated, nor has any testimony been submitted on the part of the Petitioner setting forth the exact amount of time these employees were in the allegedly affected area while performing their duties on June 21, 1979, during their normal eight-hour shift.

3. It is further stipulated by the parties that the employees listed below were in fact assigned clean-up duties in the "Ross Tramway Area" of the Homestake Mine on June 21, 1979, between the hours of 10:12 a.m. and 11:00 a.m. of that day, and were employees whose normal work area was the "Ross Shaft", who had shown up for work on June 21, 1979, and were paid for a total of four hours of work that day. These employees and rates of pay for that day are as follows:

Miners Submitting Complaint For Compensation	Hourly Wage Rate June 21, 1979
Paul Sterk	$ 7.55
David Holmes	$ 7.55
Roger Meyer	$ 7.55
Don Mayhugh	$ 7.45
Barry Martin	$ 7.55
Leo Lipp	$ 7.55
Donald Hiltebridle, Jr.	$ 7.55
Herbert Burnett	$ 7.55
Kenneth Rowan	$ 7.07
Charles Dorothy	$ 7.55
Leroy Bertsch	$ 7.55
Adam Lewis	$ 7.45
Harold Covell	$ 7.55
Homer Watson	$ 7.55
Bernard Zastrow	$ 7.55
Richard Weise	$ 7.55
Terry Allerdings	$ 7.55
David Fredericksen	$ 7.55
Fred Raubach	$ 7.55

4. It is further specifically agreed by the parties that the employees and miners listed below were paid four hours "show-up" pay, per contract agreement for June 21, 1979, and were released from their jobs at 11:00 a.m. on June 21, 1979. The following are the names and rates of pay of these employees and miners for that date:

Miners Submitting Complaint For Compensation	Hourly Wage Rate June 21, 1979
Bob L. Perry	$ 6.01
James R. Richard	$ 7.07
Jerome A. Wallin	$ 7.07
Broderick E. Stevens	$ 6.70
Ken Britigan	$ 6.70
William J. Cooper	$ 7.33
Donald S. Sanders	$ 7.55
Darwin R. Aldinger	$ 7.55
Gary J. Bown	$ 7.45
Gerald A. Clement	$ 7.07
Claude E. Crane	$ 7.45

Anthony Desimone, II	$ 6.70
Duane Dillman	$ 7.45
Leonard O. Dittus	$ 7.55
Jerome G. Feterl	$ 7.55
Leonard Feterl	$ 7.55
Janet M. Fonder	$ 7.45
Charles G. Geffre	$ 7.45
Lennie R. Grove	$ 7.07
Hilmur E. Hanson	$ 7.45
Ron R. Hayes	$ 7.07
Donald J. Hendrickson	$ 7.45
Stephen A. Kilmer	$ 7.07
Katherine L. Kimball	$ 7.07
Richard R. Kleinheksel	$ 7.55
Don J. Kleinheksel	$ 6.70
Arlen D. Kline	$ 7.26
Robert J. Kruske	$ 7.55
Herbert L. Burnett	$ 7.55
Richard Cottrill	$ 7.45
Thomas E. Jones	$ 7.55
Barry E. Martin	$ 7.55
Donald E. Mayhugh	$ 7.45
Roger D. Meyer	$ 7.55
Paul V. Sterk	$ 7.55
Paul Strecker	$ 7.55
David L. Sykes	$ 7.33
Wesley A. Schaffer	$ 7.55
Ricky D. Allen	$ 7.55
Charles Culver	$ 7.55
Keith M. Ehnes	$ 7.55
Lowell D. Labau	$ 7.55
Jimmy D. Snow	$ 7.55
James J. Grosek	$ 7.55
Raymond S. Grosek	$ 7.55
Daryle J. Poling	$ 7.55
Terry J. Wermers	$ 7.55
Mark J. Geffre	$ 7.45
Norman E. Stuen	$ 7.45
George J. Huck	$ 7.55
Ralph Huck, Jr.	$ 7.55
Michael R. Isaak	$ 7.55
John P. Kraft	$ 7.55
Kenneth E. Prue	$ 7.55
Gerald L. Rempfer	$ 7.55
Dennis D. Shumacher	$ 7.55
Jerry L. Barton	$ 7.55
Russell L. Burton	$ 7.55
Javier Barrios	$ 7.55
Blain M. Brown	$ 7.33
Robert L. Carl	$ 7.55
Charles B. Donner	$ 7.55
Donald J. Gifford	$ 7.55
Albert Grantz	$ 7.55
Raymond F. Hertel	$ 7.55

Ralph L. Long	$ 7.55
Robert G. Murray	$ 7.55
Larry D. Ostwald	$ 7.55
Joseph J. Shinabarger	$ 7.55
Clarence W. Young	$ 7.55
Vernon W. Fisher	$ 7.55
Richard A. Goetz	$ 7.55
Palmer E. Carlson	$ 7.55
Terry R. Allerdings	$ 7.55
Leroy E. Bertsch	$ 7.55
Barry J. Brierly	$ 7.18
Harold G. Covell	$ 7.55
Charles G. Dorothy	$ 7.55
David D. Frederickson	$ 7.55
Roger G. Hanson	$ 7.55
Donald L. Heltibridle	$ 7.55
Adam S. Lewis	$ 7.45
Leo J. Lipp	$ 7.55
Fredrick L. Rauback	$ 7.55
Homer W. Watson	$ 7.55
Richard W. Weisz	$ 7.55
Bernard F. Zastrow	$ 7.55
Timothy P. Dillman	$ 7.55
Cecil Holman	$ 7.55
David J. Holmes	$ 7.55
Everett A. Johnson	$ 7.55
Michael A. Kilmer	$ 7.55
Donald R. King	$ 7.55
Rick J. Tinnell	$ 7.45
Bruce A. Tracy	$ 7.55
Joe B. Sterna	$ 7.55
Robert C. Steeves	$ 7.55
Julius E. Adam	$ 7.45
Henry J. Bowers	$ 7.33
Leonard R. Bowling	$ 7.55
Jimmy R. Dower	$ 7.45
George T. Gross	$ 7.55
William A. Hall	$ 7.45
John B. Perkovich, Jr.	$ 7.45
Robert W. Raines	$ 7.45
Dale L. Rear	$ 7.45
James F. Richards	$ 7.45
Kenneth J. Rowan	$ 7.07
Leo Silvernagel	$ 7.55
Donald D. Spry	$ 7.55
Ramon N. Sterry	$ 7.45
Deborah M. Wood	$ 6.70
Alfred H. Brinkman	$ 6.70
Laverne Caldwell	$ 7.55
Oren Knightlinger	$ 7.55
Edgar Mutchler	$ 7.55
Charles Wuitschich	$ 7.55

HOMESTAKE MINING COMPANY
Respondent

By _____
Robert A. Amundson

Date 8-1-81

UNITED STEELWORKERS OF AMERICA
Petitioner

By _____
Dallas Tinnell, President

Date 8/1/81

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MERLE E. WEGNER,	:	Complaint of Discharge,
Complainant	:	Discrimination, or Interference
v.	:	
	:	Docket No. WEST 82-59-DM
ASPHALT MINING & CONCRETE COMPANY,	:	MSHA Case No. MD 81-138
Respondent	:	
	:	Higley Road Pit

DECISION

Appearances: Frank Spiegel, Esq., Tempe, Arizona, for Complainant; Daniel F. Gruender, Esq., Shimmel, Hill, Bishop & Gruender, P.C., Phoenix, Arizona, for Respondent.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Complainant was discharged on July 14, 1981, from the position he had with Respondent as a truck driver. He contends that the discharge resulted from complaints he voiced to Respondent concerning the safety of the vehicle he operated. Respondent contends that he was discharged for unsatisfactory and unsafe performance of his job.

Pursuant to notice, the case was heard on the merits in Phoenix, Arizona, on May 27 and May 28, 1982. Merle Wegner, Leonard Van Wagenen, Leon Richardson, Stewart Powers and Rodney Lippse testified on behalf of Complainant. Therese Sanders was called by Complainant for cross-examination. Clarence Ellis, William A. Ireland, James W. Lake, Robert Kreiling, Chris Reinesch, Verle Snodgrass, Gary Nord and Bryon Handy, testified on behalf of Respondent.

Both parties have filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Respondent is engaged in the mining, constructing and supplying of materials for building roads and paving parking lots - primarily asphalt. It is a mine as that term is used in the Federal Mine Safety and Health Act.

2. Complainant worked for Respondent as a truck driver from September 12, 1980 to July 14, 1981. He was a miner as that term is used in the Act.

3. From about May 14, 1981 to July 14, 1981, Complainant operated a "water-pull," which consisted of a diesel operated tractor pulling a large water tank. It was used to spray water on the haulage road and around the pits, yard and scale house. It carried approximately 8,000 gallons of water, and, when fully loaded, weighed approximately 75,000 pounds. It was equipped with air brakes.

4. During the period of Complainant's employment, Respondent had irregular employee safety meetings held at least monthly.

5. At every safety meeting attended by Complainant while he drove the water pull, he complained that the brakes on the water pull were inadequate.

6. Leonard Van Wagenen, a truck driver for Respondent from about April 1980 to November 1981, operated the water pull for about 3 months. He complained of inadequate brakes on the vehicle many times at safety meetings. Leon Richardson, a truck driver for Respondent for about 10 months, and Stewart Powers, who worked for Respondent from September 1980 to November 1981, and who drove the water pull on occasion, both were present at safety meetings when the subject of the inadequacy of the water pull brakes was discussed.

7. Respondent instructed its truck drivers to submit a "Drivers Repair Report" also called a "cry sheet" at the end of each shift to point out equipment items needing repair. Of the 38 reports on the water pull introduced in evidence, six refer to the brakes. Three of these were submitted by Complainant. On July 9, he reported that "brakes are bad." On July 13, he reported that the left rear drive had a brake pancake. On July 14, he reported that "brakes are bad."

8. The brakes on the water pull were adjusted on July 13, 1981, and a brake pancake was installed. On July 14, 1981, after the accident described below, the brakes were checked and found to be in good condition.

DISCUSSION

I am generally accepting the testimony of Verle Snodgrass, the heavy equipment shop foreman, as to the condition of the brakes on the water pull. I also find that because of the kind and weight of the vehicle, it was often difficult to stop even with good brakes. I also find that the brakes required frequent adjusting. I am specifically rejecting the testimony of Complainant and the other drivers that they were told at safety meetings and by the mechanics that the water pull did not have brakes or had inadequate brakes.

9. At some time between May and July, 1981, Complainant asked Chris Reinesch, Manager of the Quarry for Respondent, if he could have a canopy or umbrella constructed on the water pull to provide shade. Reinesch refused on the ground that a canopy would interfere with the operator's standing to see back underneath the standpipe. Sometime later, when Reinesch was away from the quarry, Complainant asked Therese Sanders, Respondent's President to have the canopy installed and she agreed. When Reinesch returned he was upset and the canopy was removed.

10. On one or more occasions, Complainant complained to Robert Kreiling, truck foreman and later Assistant to the Transportation Manager, about alleged unsafe driving on the part of Chris Reinesch and near accidents between the vehicle driven by Reinesch and the water pull driven by Complainant. He made the same complaints to Therese Sanders at least once.

11. On July 13, 1981, Complainant drove the water pull to the Salt River loading area. As the tanks were being filled with water the vehicle motor stalled and Complainant was unable to restart it. He asked a truck driver in the vicinity to call the shop and have someone come down to start it. He then sat in the vehicle with his head resting on the steering wheel. After some minutes, Chris Reinesch drove up and accused him of sleeping on the job. Complainant told Reinesch that he could not start the motor. Reinesch told him he could get jumper cables from the crusher plant but Complainant refused, telling Reinesch that he did not take orders from him and threatening to "kick his ass." After about 20 minutes, a mechanic came from the shop and the water pull was started.

12. Reinesch reported the incidents described above to Byron Handy, Vice-President and general manager of Respondent. Reinesch recommended that Complainant be discharged.

13. Robert Kreiling, the truck foreman and later assistant to James Lake, Transportation Manager, hired Complainant. He assigned Complainant to drive the water pull and generally Complainant was answerable to Kreiling for the operation of the vehicle. When the water pull was operated in the area of the crusher, watering the yard roads, Reinesch had authority over the operator. This was never made clear to Complainant prior to July 13, 1981, however.

14. Following the incidents described in Finding of Fact No. 11, Complainant, Lake, Reinesch and Ms. Sanders had a meeting concerning the incidents. Lake told Complainant that although he was under the direct supervision of Lake, he was also subject to direction by Reinesch when in the crusher plant area. Lake stated that Complainant declined to follow Reinesch's directions and that this was insubordination and would not be tolerated. There was also discussion of the canopy incident concerning which Reinesch was still upset. Reinesch said that he found Complainant asleep at the wheel of his vehicle and that Complainant threatened to kick Reinesch's ass. Lake reprimanded Complainant, but did not further discipline him at that time.

15. On July 14, 1981, while Complainant's water pull was being filled, he picked up a snake near the pond. The snake wrapped itself around Complainant's arm as he operated the pull watering the haulage road. He deviated from his normal course and drove with one hand, holding down the arm on which the snake was to avoid letting Reinesch see him with the snake on his arm. He later threw the snake away and continued on his normal duties.

16. On July 14, 1981, the water pull operated by Complainant collided with a road grader, also called a blade, which was grading or regrading the haul road. Prior to the accident, the blade was positioned in the center of the road and was travelling westerly. According to a company rule, the blade has the right-of-way over other vehicles on the road. The blade operator saw Complainant in the water-pull approximately 175 feet away coming in the opposite direction. The blade operator stopped his vehicle and stood up and waived because he wanted Complainant to discontinue watering the road at that time.

17. The water pull continued coming and attempted to pass the blade on the right but the left rear tire of the water pull struck the corner of the mold board on the blade. The grader was stopped when the collision occurred.

18. As a result of the collision, the left rear tire of the water pull was cut and the wheel rim was bent. The control arm on the blade was broken and the blade later fell off.

19. The grader was visible from the water-pull prior to the collision from at least 175 feet.

20. There was room on the road for the water pull to pass the grader without colliding with it.

21. The brakes on the water pull were operative at the time of the accident.

22. Following the accident, Complainant drove up to the yard and was told by the dispatcher to go home since the other water-pull was inoperative.

23. When Lake arrived at work on July 14, 1981, he was told of the accident by Kreiling. Lake examined the vehicles and talked to the blade operator and a truck driver who witnessed the accident. He also discussed the condition of the brakes with the heavy equipment mechanic. He was told by Kreiling about Complainant driving earlier that morning with a snake on his arm. Lake decided to terminate Complainant because he concluded that Complainant was driving the water pull in an unsafe manner and that this caused the accident.

24. The decision to terminate Complainant was made by Lake alone.

25. Lake was appointed to the position of Transportation Manager on July 1, 1981. He did not attend any safety meetings prior to Complainant's termination and was not aware of any complaints of bad brakes on the water pull made at those meetings. He was aware of the "cry sheet" which Complainant submitted on July 13, 1981.

STATUTORY PROVISION

Section 105(c) of the Act provides in part as follows:

> (c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners, or applicant for employment . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine . . . or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

ISSUES

1. Whether Complainant was terminated from his employment because of safety complaints.

2. If so, what is the appropriate relief.

CONCLUSIONS OF LAW

1. Complainant and Respondent were subject to the provisions of the Mine Safety Act at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. The complaints made by Complainant orally and in writing about the inadequacy of the brakes on the water pull described in Findings of Fact Nos. 5 and 7 related to safety and constituted activity protected under the Act.

3. Complainant failed to establish that he was terminated as a result of the safety complaints referred to above.

DISCUSSION

I accept the testimony of James Lake that at the time he discharged Complainant, Lake was not aware of any complaints concerning the brakes on the water pull voiced by Complainant at safety meetings. He was aware of the July 13, 1981, cry sheet which stated "Left rear drive has a brake pancake." I generally accept Lake's testimony that he discharged Complainant because of (1) the accident; (2) the snake incident; and (3) the reprimand issued to Complainant on July 13, 1981, for insubordination. Whether Complainant was fairly blamed for the accident, and whether the reasons given for the discharge were sufficient to justify discharge are not issues before me. See Secretary/Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508 (1981). Further, the reasons for Complainant's personality clash with Reinesch and Complainant's contention that he was not adequately informed as to his supervisors, are of no importance to a decision in this proceeding. I think the evidence establishes that the brakes on the water pull caused difficulty to the operators of the vehicle. The evidence establishes that Complainant complained of inadequate brakes on the vehicle. These complaints were made in good faith, were reasonable and were related to employee safety. But the evidence does not show a nexus between the complaints and Complainants discharge.

4. Complainant failed to establish a violation of section 105(c) of the Act.

ORDER

On the basis of the above findings of fact and conclusions of law, the complaint and this proceeding are DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution: By certified mail

Frank Spiegel, Esq., 2609 W. Southern #52, Tempe, AZ 85282

Daniel F. Gruender, Esq., Shimmel, Hill, Bishop & Gruender, P.C., 10th Floor, 111 West Monroe, Phoenix, AZ 85003

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

HAROLD CRUMLEY, Complainant	:	Complaint of Discharge, Discrimination or Interference
v.	:	Docket No. WEST 82-128-DM
ANAMAX MINING COMPANY, Respondent	:	Twin Buttes Mine

ORDER OF DISMISSAL

On September 15, 1982 a combined Notice of Hearing and Prehearing Order was issued by the undersigned and duplicate service by certified mail was attempted at Complainant's last known address. The envelopes containing said documents were returned unopened and marked presumably by postal authorities "not deliverable", "records searched, no address on file", "moved, left no address" and "unable to forward". Additional efforts were made to locate Complainant but without success.

Commission Rule 5(c), 29 CFR § 2700.5(c), requires, and common sense dictates, that a party "promptly" give to the Commission "written notice" of "any change in address or business telephone number". It is apparent that Complainant has failed to comply with the requirements of said rule, thereby making further prosecution of this case impossible. Accordingly, I have no alternative but to dismiss this case for lack of prosecution.

Gary Melick
Assistant Chief Administrative
Law Judge

Distribution:

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. KENT 82-27 A/O No. 15-08906-03046
v.	:	No. 1 Mine
NBC ENERGY, INCORPORATED, Respondent	:	

DECISION

Appearances: W. F. Taylor, Esq., Trial Attorney, Office of the Regional Solicitor, U.S. Department of Labor, Nashville, Tennessee; Messrs Wayne W. Clark and Jack D. Bush, Co-Owners, NBC Energy, Inc., Prestonburg, Kentucky.

Before: Judge Kennedy

Statement of the Case

This matter is before me on the Secretary's unopposed motion for summary disposition. The motion is supported by (1) affidavits of the federal mine inspectors responsible for the charges made, (2) answers to interrogatories by Mr. Clark on behalf of the corporate respondent, NBC Energy, Inc. (NBC), (3) depositions of the co-owners and principal officers of NBC, Messrs Clark and Bush, (4) the transcript, exhibits and decision of the trial judge in Secretary v. NBC Energy, Inc., 4 FMSHRC 1498 (August 2, 1982), and (5) financial statements and corporate and individual tax returns of the corporate respondent and its co-owners for the period July 1979 through May 1982.

The principal issue presented is whether imposition of the penalties proposed, $1,680, for the ten violations charged, will adversely affect the ability of the corporate respondent and its co-owners to continue in business. After discovery, the Secretary invokes the alter ego or "single enterprise entity" doctrine to pierce the corporate veil of NBC and its affiliated corporation, C&B Coal Company (C&B), and thereby subject NBC, C&B, their successor corporations and their co-owners, Messrs Clark and Bush, to liability for the penalties proposed.

The Supreme Court has encouraged use of the "single enterprise entity" theory to penetrate schemes that employ corporate shells or proprietary corporations to circumvent enforcement of regulatory statutes and orders. NLRB v. Deena Artware, Inc., 361 U.S. 398, 403 (1960). 1/

1/ As explained by the Court:

". . . the question [is] whether in fact the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities. One company may in fact be operated as a division of another; one may be only a shell, inadequately financed; the affairs of the group may be so intermingled that no distinct corporate lines are maintained. These are some, though by no means all, of the relevant considerations . . . ." Id.

The seminal exposition of the theory is set forth in Berle, The Theory of Enterprise Entity, 47 Col. L. Rev. 343 (1947). It is based on a recognition of the fact that, despite its long history of entity, a corporation or group of corporations are at bottom but an association of individuals united for a common purpose and permitted by law to use a common name. When the corporate fiction is disregarded, an actual underlying enterprise entity may be made to appear. According to Berle:

". . . the underlying principle seems plain. Whenever corporate entity is challenged, the court looks at the enterprise. Where the enterprise as such would be illegal or against public policy for individuals to conduct, that enterprise is equally illegal when carried on by a corporation, and the corporate form is not

Thus, in Deena Artware, supra, the Court held that a regulatory agency is entitled to show in an enforcement proceeding that a group of "separate corporations are not what they appear to be, that in truth they are but divisions or departments of a 'single enterprise'". Id. at 402.

A subsidiary issue is whether the penalties proposed are excessive to the policy of deterrance and should, therefore, be reduced to more realistically reflect the seriousness of the violations charged.

Under the Commission's rules when a motion for summary decision is made and supported as provided in the rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in the rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary decision, if appropriate, will be entered against him.

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fn. 1/ (continued)

a protection. This is, in essence, not so much a 'disregard of the corporate fiction' as it is a holding that the economic enterprise is illegal or criminal, or in violation of public policy, or fraudulent, or otherwise objectionable, as the case may be. The nature of the enterprise determines the result, negativing the corporate personality or any other form of organization of that enterprise.

"If it be shown that the enterprise is not reflected and comprehended by the corporate papers, books and operation, the court may reconstruct the actual enterprise, giving entity to it, based on the economic facts. Thus one corporation may be shown to be only an 'instrumentality' of a larger enterprise, or to be so intermingled with the operations of such larger enterprise as to have lost its own identity. On such reconstruction of the true entity the court may assign the liabilities of the paper fragment to the economic whole. . . ." Id. at 354.

Because the operator has the burden of proof on the issue of financial jeopardy and appears pro se, the trial judge has subjected the Secretary's motion and evidence to close scrutiny and made an independent audit and de novo evaluation of the propriety of granting the motion. Applying this standard, I find there is no triable issue of fact and that the Secretary is entitled to summary decision as a matter of law. 2/

2/ The parallel penalty proceeding cited above was heard and decided by another Commission judge in May 1982 on a record that embraced the same time frame, the same parties and the same claims and issues with respect to financial jeopardy. The final disposition issued in August was not appealed or docketed by the Commission for review. Because the decision did not specify the basis on which the judge chose to disregard the separate identities of NBC and C&B or why they should together with their co-owners, Clark and Bush, be considered part of a single integrated business entity, I have undertaken to make a de novo review of the evidence and the applicable law and precedents. The same lack of articulation in the earlier decision also leads me to conclude that application of the twin doctrines of res judicata and collateral estoppel would be inappropriate.

While the Secretary did not name Clark and Bush as individual respondents in either proceeding, both had notice and appeared pro se to defend on the ground of limited liability (corporate shield) and inability of their corporate instrumentality, NBC, to respond without allegedly jeopardizing their ability as individuals to continue in the business of mining coal. If, as the Secretary contends, therefore, NBC and the other corporate entities are the alter egos of Clark and Bush they have no right to any additional notice. Valley Finance, Inc. v. United States, 629 F.2d 162, 169 (D.C. Cir. 1980). On the other hand, if Clark and Bush prevail in their view that NBC and C&B and their successor corporations should be recognized as a shield against derivitive liability they obviously need no additional notice. Further, since the fact of violation is admitted and the only issue is the amount of the penalties warranted for the ten violations charged this is not a proceeding to determine responsibility for violating the law but only who shall pay for the violations admitted. Under these circumstances, the Court of Appeals for the Second Circuit has held that the thrust of Deena Artware, supra, is that an already adjudicated or, as here, judicially admitted liability may be imposed on parties not themselves charged in the initial proceedings where, under the single enterprise theory, they are found to be derivatively liable as part of the single business enterprise involved in the violations admitted or adjudicated. NLRB v. C.C.C. Associated, Inc., 306 F.2d 534, 539 (2d Cir. 1962).

Findings and Conclusions

The Capitalization of NBC

The corporate respondent, NBC Energy, Inc., a Kentucky corporation, began operating the No. 1 Mine, a non-union mine, near Coal Run, Pike County, Kentucky on or about July 23, 1979. The company ceased active operations at the mine on or about May 17, 1982, and was immediately succeeded by Wayne Clark, Inc., a Kentucky corporation owned by the same individual, Wayne Clark, who appears on respondent's behalf in this matter and who succeeded to sole ownership of NBC in February 1982. The ten violations charged occurred during the period April 1981 through September 1981 at a time when Wayne Clark and Jack Bush, who also appears on behalf of respondent in this proceeding, each owned 50% of NBC.

Wayne Clark, the president of NBC functioned as the outside man and managed business. Jack Bush, the vice president and secretary of NBC, functioned as the inside man and was in charge of producing coal. As Mr. Clark noted, they started the business on a "shoestring." Clark, Bush and a man named Stanley Neese each put up $1,000 for a total capitalization of only $3,000. 3/ Neese dropped out in 1980 and thereafter Clark and Bush owned equal shares of NBC. The company operated on a fiscal year that ran from June 1 to May 31.

3/ When Clark and Bush started the C&B Coal Company a few years earlier, they capitalized it at $25,000.

Operation of NBC and C&B

According to Bush, Clark worked only part time, about 20 hours a week, at managing NBC. Bush as mine superintendent and foreman worked more or less full time on the production end of the business. 4/ NBC was incorporated May 29, 1979 and operated the mine under a lease from Kentucky Coal Company. Kentucky Coal paid NBC a royalty on the coal produced that averaged $16.00 a ton. In February 1982, Clark bought out Bush's interest in NBC and after May 1982 declared NBC insolvent and continued the business through Wayne Clark, Inc., another of Mr. Clark's proprietary corporations.

At the time it commenced operations, NBC owned $28,000 worth of mining equipment. 5/ It leased equipment from Kentucky Coal for which

4/ The record shows that for the three years NBC was in business it produced approximately 185,000 tons of coal for which it received an average price of $16.00 a ton. Its gross revenues from the sale of coal were approximately $2.9 million dollars. According to the operator's unaudited financial statements and answers to interrogatories, its cost of production for the three year period totalled approximately $2.7 million dollars. Its gross profit for the period was therefore approximately $200,000. Despite this, the operator claims a loss on the operation of approximately $189,000. The Secretary's response is that during at least the first two years of its operations NBC leased coal mining equipment valued at $60,000 from Clark and Bush doing business as the C&B Coal Company for which they paid themselves $177,832 in equipment rentals. In addition, the Secretary claims Clark and Bush through NBC paid management fees and administrative salaries to C&B that C&B in turn paid to them individually that totalled $153,120. These allegedly unwarranted diversions of funds totalled $330,952.55 for the first two years of NBC's operations.

5/ By the time it ceased operations, NBC had increased the value of these assets to $75,000. Of this, $37,500, was owned outright and the rest was held subject to the usual installment credit arrangements on mining equipment.

it paid an equipment rental of $61,571.61 during its first year of operations. It also leased equipment from C&B Coal Company, Inc. C&B was a non-operating company jointly owned by Clark and Bush. C&B became inoperative in September 1979, a few months after NBC began operations. C&B was shut down because it was subject to the collective bargaining agreement between the BCOA and the UMWA. Mr. Clark testified that C&B's mining equipment was not needed to operate the No. 1 Mine because the "Kentucky Coal Company had enough equipment at the NBC Energy Number One Mine to operate it." 6/ Despite this, Clark and Bush leased C&B's equipment to NBC. The first year's rental on unneeded equipment that Clark valued at only $60,000, was $116,720.26. During its second year of operations, NBC paid C&B an additional equipment rental that totalled $61,112. 7/ NBC apparently continued to pay an equipment rental to C&B until some time between February and May 1982 when NBC turned operation of the No. 1 Mine over to Wayne Clark, Inc. I find this leasing arrangement was not a bona fide arms-length transaction and was designed to cloak the true nature of the financial condition of the affiliated corporations and their co-owners. I also find (1) that as the controlling stockholders of NBC and C&B Clark and Bush were at all times relevant the beneficiaries and true parties in interest with respect to revenues and income received and disbursed

6/ This testimony was given in the parallel proceeding and appears at pages 58, 61-62 of the transcript in Docket Nos. KENT 81-133, et al.

7/ During this period, C&B claimed almost $50,000 in depreciation on this and other equipment it leased out.

by NBC and C&B and (2) that the corporations were the mere alter egos of the two individuals and part of a single, integrated, economic entity.

Analysis of NBC and C&B's Financial Condition

An analysis of the financial condition of the single enterprise entity (NBC, C&B) as disclosed by unaudited data and the testimony of Clark and Bush discloses the following. For the period ending May 31, 1980, NBC had gross revenues of $1,061,591 but claimed a net loss of $108,860. Its itemized cost of production included the $116,720 paid C&B for equipment rental as well as $76,700 paid C&B for management fees. During the first year of operations, Clark and Bush took their salaries from the sums paid C&B for management fees and drew no salaries from NBC. Clark was paid a salary of $30,975 and Bush was paid $32,975. It is not clear what the remainder of this fee was used for. If the management fee is considered a wash, the revenue from the equipment rental still more than offset the claimed loss of $108,860 and resulted in a profit before taxes, and after handsome salaries, of almost $8,000, a four fold return on each individual's initial investment of $1,000.

Further analysis shows NBC's profit was even greater because Clark and Bush charged as a cost of production the unpaid civil penalties assessed against NBC by MSHA. For the first year of their operations this totalled $8,026 and for the second year $19,859. Penalties are, of course, a cost of doing business, but they are not tax deductible. 8/

8/ Treasury Regulation ¶1.162-21 (1975). Apparently IRS is not policing this as NBC's accrued but unpaid civil penalties for both 1979 and 1980 were claimed and allowed as deductible costs on NBC's tax returns for

Nor, in my view, is it proper to consider unpaid penalty assessments as contributing to an operator's financial impairment where the monies were actually used to fund operations.

Thus, instead of net losses for the first year of operations NBC, C&B and their owners had a return on investment during that time of something like 100% on equipment rental alone ($60,000, investment v. $117,000 rental). In fact, Mr. Clark admitted that the first year rental arrangement between C&B and NBC resulted in a profit to C&B of approximately $37,000. In addition, as we have seen, each individual took home a salary of over $30,000. 9/

For the second year, it appears the equipment rental was $61,112, most of which was sheltered by a $50,000 deduction for depreciation. NBC also paid C&B $13,650 for management fees during the second year. During the second year, Bush was paid a salary by NBC of $34,450 plus $6,825 in management fees by C&B for a total compensation of $41,275. Clark was paid a salary of $28,320 by NBC plus $6,825 in management

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fn. 8/ (continued)
those years. For just those two years the amount totalled almost $28,000, almost twice the amount of NBC's present civil penalty liability of $16,520. The reduction from the amount initially assessed of $35,598 resulted from 80% reductions that were approved on settlement by a trial judge who apparently was unaware of the true business and financial relationship of Clark, Bush and their alter ego corporations. Secretary v. NBC Energy, Inc., Dkt. Nos. KENT 80-185, et al.; Secretary v. NBC Energy, Inc., Dkt. Nos. KENT 80-173, et al., (Decisions Approving Settlement issued April 14 and December 29, 1981).

9/ Curiously enough, neither individual seems to have reported any investment income or loss on his individual income tax return.

fees by C&B for a total compensation of $35,145. Clark, who worked at management only part time, curtailed his salary in the latter part of 1980 but still drew a salary from NBC of approximately $23,000 in 1980. The amount of Mr. Clark's unearned or investment income from C&B for the second year was not disclosed. It must have been substantial since C&B reported rental income for that year of $87,000.

Furthermore in the second year NBC's gross profit would have been $105,492 if the equipment rental siphoned off by C&B for the benefit of Clark and Bush had been available as operating or working capital for NBC. Even after paying management fees and administrative salaries to Clark and Bush of $76,420 this would have left NBC a net profit before taxes of approximately $16,000. Again, it was the diversion of working capital coupled with the initial undercapitalization that created the illusion of a losing operation that was, in fact, quite profitable. Even more profitable than appears from the face of the financial records because almost $20,000 in accrued but unpaid assessments were diverted and expended for purposes that apparently served the personal interests of Clark and Bush. Thus, NBC's profit before taxed during its second year may actually have been almost $36,000.

The unaudited records of NBC's third, and last year of operations, May 1981 to June 1982, shows NBC produced approximately 60,000 tons of coal at a gross revenue of approximately $975,000. Net earnings after all expenses for the first eight months totalled $16,900. Mr. Clark's salary for this period was at least $20,000 and Mr. Bush received approximately $30,000. Again neither individual's investment income was disclosed.

The Successor Corporations

After Messrs Clark and Bush dissolved their association in February 1982, Mr. Clark decided to declare NBC "insolvent," to rent NBC's equipment to his successor proprietary corporation, Wayne Clark, Inc., and to continue operation of the No. 1 Mine. 10/ Mr. Bush, also, and without interruption, continued in the business as the J&L Coal Company, operating the No. 2 Mine in Pike County, Kentucky. There is no suggestion, let alone evidence, that payment of the modest penalties assessed for these ten violations would create any cash flow problem or otherwise have an adverse effect on the continued viability of either of the two successor corporations. 11/

10/ Mr. Clark testified that in May 1982 he had twelve miners working the mine, was mining 4,000 tons of coal a month, and was meeting a $20,000 a month payroll.

11/ In fact, the record shows that Messrs Clark and Bush are not really concerned with paying the $1,680 involved in this case. What they are seeking is a declaration by a Commission judge that they can cite as establishing once and for all their right to violate the Mine Safety Law on a discount basis. After years of persistent effort this was the type of relief obtained by the Davis Coal Company. Compare Secretary v. Davis Coal Company, 4 FMSHRC 1168 (1982) [despite small operator's history of poor compliance, marginally safe operation and prior decisions establishing its financial responsibility, operator granted right to write off dozens of violations at 20 cents on the dollar] with Secretary v. Davis Coal Company, Dkt. Nos. WEVA 82-111, et al. (September 15, 1982), [same small operator allowed to write off violations at 20 cents on the dollar before same judge based on his earlier decision and fact that operator had filed a petition in bankruptcy]. Here, unlike Davis however, the solicitor has compelled the production of sufficient financial data concerning the totality of Messrs Clark and Bush's business dealings to permit an objective analysis and evaluation of the operator's self-serving declarations and accounting practices. More aggressive and imaginative use of discovery and the single enterprise theory should do much to curb the belief among small operators that the Commission is prepared to confer a prescriptive right to violate the Act on almost any small operator who is willing to swear his operation is unprofitable. Congress never intended that

I find that NBC, C&B, J&L and Wayne Clark, Inc. were and are the alter egos of their individual owners, Clark and Bush, and that to recognize them as separate corporate identities would merely further a scheme to circumvent effective enforcement of the Mine Safety Law. There is for application therefore the principle that:

> Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy. New Colonial Ice Co. v. Helvering, 292 U.S. 435, 442 (1934); Chicago M. & St. P.R. Co. v. Minneapolis Civic Assn., 247 U.S. 490, 501 (1918). In such cases, courts of equity, piercing all fictions and disguises, will deal with the substance of the action and not blindly adhere to the corporate form. Bangor Bunta Operations v. Bangor & A.R. Co., 417 U.S. 702, 713 (1974).

The precedents establish there where, as here, a closely held proprietary corporation is undercapitalized, and its financial resources drained off by the controlling stockholders the corporate form may be disregarded if its recognition as an entity separate and distinct from its ownership will enable the corporate shield to be used to defeat a regulatory statute. Schenley Distillers Corp. v. United States, 326 U.S. 432, 437 (1945); Bruhn's Freezer Meats v. United States Dept. of Agr., 438 F.2d 1332, 1343 (8th Cir. 1971). See also 1 Fletcher, Corporations ¶45 (Rev. Ed. 1974).

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fn. 11/ (continued)
a mitigating factor should be invoked to systematically deprive miners of the protection of the law or to justify a policy of tokenism in the assessment of civil penalties. Clark and Bush have used the administrative process to their advantage in obtaining an 80% reduction on the 81 violations previously settled. One coalscam is more than enough.

Further, it is clear that where enforcement of a regulatory statute or order may be frustrated because a corporation has been inactivated, dissolved or rendered judgment proof while the individuals involved under the cloak of a new corporation continue to engage in proscribed activities the corporate fiction will not be permitted to "stand athwart" the regulatory purpose. Bruhn's Freezer, supra; Capital Telephone Company, Inc. v. FCC, 498 F.2d 734, 738 n. 10 (D.C. Cir. 1974). Under these and similar circumstances a federal regulatory agency is entitled to look through the corporate veil and to treat the individual owners and the separate entities as one for purposes of regulation. General Tel. Co. v. United States, 449 F.2d 846, 855 (5th Cir. 1971).

Indeed, the fiction of a corporate entity must be disregarded whenever it has been adopted or used to defeat a paramount public policy such as that designed for protection of a vital national resource--the nation's miners. This doctrine is firmly entrenched in our jurisprudence. See cases collected in footnotes 95, 107 of Quinn v. Butz, 510 F.2d 743 (D.C. Cir. 1975); 1 Fletcher, Corporations ¶¶41-46 (Rev. Ed. 1974).

Consequently, whenever recognition of the corporate device will frustrate the clear intendement of the law such as the ability of the Government to collect taxes or penalties, the courts have not hesitated to ignore the fiction of separateness and approve a piercing of the corporate veil. Valley Finance, Inc. v. United States, 629 F.2d 162, 171 (D.C. Cir. 1980); Casanova Guns, Inc. v. Connally, 454 F.2d 1320, 1322 (7th Cir. 1972).

Nor does application of the doctrine require allegation or proof of actual fraud; it suffices that the corporate fiction has actually been used to frustrate the statutory scheme. Addressing the contention that an intent to circumvent must be shown the court in Kavanaugh v. Ford Motor Co., 353 F.2d 710, 717 (7th Cir. 1965) held:

> Intention is not controlling when the fiction of corporate entity defeats a legislative purpose. The question is whether the parties did what they intended to do and whether what they did contravened the policy of the law.

Nor in cases involving the frustration of a regulatory statute is the single enterprise entity or alter ego doctrine subject to the strict standards that govern application of the doctrine in tort or contract cases. Capital Telephone, supra, at 738. State law limitations on the alter ego theory are not controlling in determining the permitted scope of remedial orders under federal regulatory statutes. Sebastopol Meat Company v. Secretary of Agriculture, 440 F.2d 983, 958 (5th Cir. 1971). Even under the strictest of standards a controlling factor in denying stockholders the defense of limited liability is a showing of obvious inadequacy in the capitalization of a corporation. Anderson v. Abbott, 321 U.S. 349, 362 (1944).

For these reasons, I conclude that where, as here, the corporate device was manipulated to create an erroneous appearance of a failing corporate operator, it is my duty to look through form to substance and to fashion an order that will preclude evasion of either corporate or individual responsibility. Anderson v. Abbott, supra, at 362-363.

This conclusion is based on undisputed evidence which shows:

1. That if C&B's unneeded mining equipment had been contributed as part of the capital contribution of NBC, or

2. If the unnecessary leasing arrangement had not been used to create a dearth of working capital while funneling funds to Clark and Bush through C&B,

there would have been no deficit in NBC's operating account or balance sheet for the three years of its operation.

Turning now to the claim that the individual penalties assessed are excessive in the light of the negligence, gravity, and the operator's history or prior violations, I find that for the reasons detailed in the Secretary's motion as supported by the uncontradicted affidavits of the inspectors involved the penalties assessed for the violations charged are, with one exception, fully warranted and in accord with the statutory criteria. 12/

The exception is the charge that the operator was violating its approved roof control plan by driving two entries four to eight feet in excess of the 20 foot width specified. This violation was aggravated by the fact that (1) two scoop operators were required to work under unsupported roof; (2) that it was a violation which the operator knew or should have know existed; and (3) that during the previous 14 month

12/ I specifically find that NBC's history of prior violations, approximately 200 over a three year period at an average rate of 66 per month is indicative of a serious lack of concern for mine safety on the part of the operator.

period there had been six roof control violations. 13/ For these reasons, I find the amount of the penalty warranted for this violation (Citation 958072) should be increased from $295 to $500. 14/

Summary

In summary, during the three year period the No. 1 Mine was operated under the control of Clark and Bush through NBC they (1) compiled a record of some 200 violations (at the rate of 66 violations a month), (2) paid only $425 in civil penalties, (3) sold 83,000 tons of coal during the first year of operations at $16.00 a ton and produced a gross revenue of approximately $1,300,000; (4) sold 50,000 tons of coal a year the last two years of their operations that produced a gross revenue of approximately $1,600,000; (5) had gross revenues over the three year period of

13/ The MSHA District Manager after canvassing his inspectors furnished the following with respect to the contractor's attitude toward safety:

> "Approximately two weeks prior to the beginning of a regular mine safety AAA (11/30/81) inspection, the mine management replaced the mine foreman (inside foreman), with a foreman who is a more mine safety regulation oriented individual. This foreman has reduced the number of citations with little or no expense to the operator.
>
> An opinion by our inspectors is that much of the previous inability to comply with the mine safety law was due to a lack of effort instead of inadequate working capital. In previous inspections, there were instances of deluge fire suppression systems dismantled on belt drives, face ventilation devices not being used during production and loose coal and float coal dust being allowed to accumulate on equipment and working section. Many of these violations could have been avoided by good management practices. In the most recent regular inspection conducted after the new foreman had taken over, only one violation of the law was observed."

14/ Roof falls this year, as every year, are again the leading cause of death in the mines accounting for 39 of the 94 deaths as of September 15, 1982.

approximately $2.9 million dollars; (6) diverted approximately $200,000 of NBC's working capital or revenues to themselves through unneeded equipment rentals paid C&B, (7) reaped a 7% return on sales; (8) almost doubled their assets; (9) persuaded the Secretary and one judge to approve settlements on 81 violations that reduced the penalties proposed by 80% on the ground NBC was a "small" operator in "dire financial condition"; (10) but, in May 1982, left another judge "unconvinced" of their claimed "dire" financial straits when, as the result of financial disclosure made pursuant to discovery orders, the answers to interrogatories, the depositions taken in April 1982, and the testimony adduced at the hearing in May 1982 a preponderance of the probative evidence showed conclusively that Clark and Bush had taken advantage of "opportunities for asset concealment and manipulation" through the use of "multiple corporations." Secretary v. NBC Energy, Inc., 4 FMSHRC supra, at 1501.

I conclude therefore that:

1. The undisputed evidence in the record considered as a whole shows there is no genuine issue of material fact.

2. That Clark and Bush operated NBC and C&B as a single integrated business profitably and successfully during the period July 1979 through May 1982, notwithstanding the failing company appearance reflected on the face of NBC's unaudited financial statements.

3. Applying the alter ego or single entity doctrine, Clark, Bush, NBC, C&B, J&L and Wayne Clark, Inc. are jointly and severally liable for payment of the penalties hereinafter assessed.

4. The Secretary is entitled to summary decision as a matter of law.

Order

The premises considered, it is ORDERED:

1. That for the violations found the following penalties be, and hereby are, ASSESSED:

Citation 953508	$130.00
Citation 957626	98.00
Citation 958069	114.00
Citation 958070	140.00
Citation 958071	114.00
Citation 958072	500.00
Citation 957222	114.00
Citation 966468	225.00
Citation 966469	225.00
Citation 966470	225.00
Total	$1,885.00

2. That Wayne W. Clark, Jack D. Bush, NBC Energy, Inc., C&B Coal Company, Inc., J&L Coal Company and Wayne Clark, Inc., jointly or severally pay the amount of the penalties assessed, $1,885, on or before Friday, November 26, 1982, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DELMONT RESOURCES, INCORPORATED, Contestant	:	Contest of Citation
v.	:	Docket No. PENN 80-268-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	

DECISION

Appearances: Harvey A. Zalevsky, Esq., Greensburg, Pennsylvania, for Contestant;
David Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Administrative Law Judge Broderick, on remand from the Commission

STATEMENT OF THE CASE

This proceeding were originally heard by Judge John F. Cook on September 16, 1980. Judge Cook issued a decision on April 23, 1981, in which he found that the contested citation was properly issued under the Federal Mine Safety and Health Act of 1977, that the violation charged in the citation was caused by the unwarrantable failure of Contestant to comply with the safety standard, but that the evidence did not support a finding that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. On the basis of the latter finding, Judge Cook modified the citation from one issued under section 104(d) to one under section 104(a).

The Secretary filed a petition for discretionary review, seeking review of the Judge's finding that the violation was not "significant and substantial." The United Mine Workers of America sought review on the same ground. Both petitions were granted by the Commission on June 2, 1981.

The Commission remanded the case on May 3, 1982, "to give the parties an opportunity to present evidence relevant to the National Gypsum test" (on the meaning of significant and substantial). Following remand, the case was assigned to me. Pursuant to notice a hearing was held in Washington, Pennsylvania on June 29, 1982. Anthony Russo and Roger Uhazie testified on behalf of the Secretary of Labor. Homer Miller, Kenneth Cutlip and John Cunnard testified on behalf of Contestant. The United Mine Workers of America did not appear at the hearing. Both parties filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision:

I accept as res judicata the conclusion of Judge Cook that the "evidence establish(es) a practice at the Delmont mine in violation of the roof-control plan's 18-foot width requirement for entries and crosscuts. The evidence is sufficient to establish the existence of the individual conditions comprising the practice only at those locations where measurements were actually taken." (Judge Cook's decision, p. 13). The Judge found three such locations on January 15, 1980, in each of which the conditions existed for a distance of 2 to 3 feet: (1) the second open crosscut between No. 2 and No. 3 entries; (2) the last open crosscut between No. 1 and No. 2 entries; (3) a "spot" in No. 1 entry approximately 60 feet outby the face. In each of these locations, the crosscut or entry was from 19 to 21 feet wide, and there were no additional supports.

The issue before me in this proceeding is whether this practice as shown by the conditions referred to above is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

FINDINGS OF FACT

1. On the date of the violation, January 15, 1980, the immediate roof in the No. 1 entry was composed of sandstone. The roof conditions were good and there was no evidence of cracks or scaly material in the roof.

2. The excessive widths found to be involved in the violation resulted from the mine floor in the area sloping to the right which caused the miner to drift toward the right rib when cutting the coal.

3. In at least two of the areas of excessive width found by Judge Cook, the last row of roof bolts were from 4 to 6 feet from the right rib. The approved roof control plan called for bolts not more than 3 feet from either rib.

4. There was a fault running across the overburden in entries 2 and 3, consisting of a separation of sandrock, so that the sandrock went up into the covering strata instead of running parallel to the coal seam. As of January 15, 1980, it was not clear in what direction the fault was running, or whether it would intersect entry No. 1.

5. An unintentional roof fall occurred in the subject mine in March 1980 in a crosscut between entries No. 1 and 2.

6. The practice of driving entries wider than permitted by the roof control plan, without additional roof supports, creates a greater stress on the roof and is more likely to cause the strata above to deteriorate and separate than would be the case if the roof control plan were followed.

7. The failure to maintain supports within 3 feet of the rib results in an area of unsupported roof which creates a greater stress on adjacent roof.

STATUTORY PROVISION

Section 104(d)(1) provides in part as follows:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act . . . .

ISSUE

1. Whether the practice followed by Contestant of driving entries wider than the 18 feet prescribed by the roof control plan as evidenced by the three locations of excessive width found by Judge Cook was reasonably likely to result in an injury or illness of a reasonably serious nature?

THE NATIONAL GYPSUM DECISION

The Commission, in a decision issued April 7, 1981, Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822, interpreted the significant and substantial provisions of section 104(d) as follows:

> We hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Id., at 825.

Under this test it is necessary (1) to consider the particular facts surrounding the violation; (2) to determine whether an injury or illness is reasonably likely to occur as a result of the hazard; (3) if so, to determine whether the injury or illness will be of a reasonably serious nature.

CONCLUSIONS OF LAW

The hazard contributed to by the violation found is this case is a roof fall. If a roof fall occurred, a resulting injury would clearly be of a reasonably serious nature. The only substantial question in the case is whether under the conditions present, a roof fall was reasonably likely to occur.

The evidence in this record establishes that roof falls are quite unpredictable. What appears to be good roof may unexpectedly fall even if supported in accordance with the roof control plan. A sandstone roof is more stable and much safer than a soapstone roof. However, unsupported roof, of whatever kind, is per se a safety hazard and likely to fall and cause injury to miners.

The practice of driving entries at widths in excess of those called for in the roof control plan creates an area of unsupported roof since the roof bolt supports only a small area of roof (the plan in question calls for bolts on "4 foot centers." The theory is that a bolt provides support to the roof only for 2 feet to either side). The rib acts as a roof support for a distance of 1 to 2 feet. Therefore, a practice of installing the first row of bolts more than 4 feet from the rib creates an area of unsupported roof between the rib and the bolt.

I conclude that the practice constituting the violation of the roof control plan found by Judge Cook was reasonably likely to result in a roof fall which would injure a miner. There is the further fact that a fault was running through the roof strata and it was not certain at the time the citation was issued what course it was following. Should it intersect with No. 1 entry what was a solid sandstone roof would become a much less stable soapstone roof, and a fall would become even more likely. I have already found that if an injury occurred it would be reasonably serious.

Therefore, I conclude that the violation found by Judge Cook to have occurred, and to have been the result of Contestant's unwarrantable failure to comply with the regulation in question, was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

ORDER

Based on the above findings of fact and conclusions of law, Citation No. 624406 issued under section 104(d)(1) is AFFIRMED as issued; the Notice of Contest is DENIED and this proceeding is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution: By certified mail

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. KENT 82-44 A.O. No. 15-11652-03015
v.	:	Ely Hollow Deep
STERLING ENERGY, INC., Respondent	:	

DECISION

Appearances: Carole M. Fernandez, Attorney, U.S. Department of Labor, Nashville, Tennessee, for the petitioner; Ralph Ball, Corbin, Kentucky, pro se, President, Sterling Energy, Inc., respondent.

Before: Judge Koutras

Statement of the Proceedings

This proceeding concerns a proposal for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with 11 alleged violations issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceedings and a hearing was held on August 24, 1982, in London, Kentucky, and the parties appeared and participated fully therein.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposal for assessment of civil penalties filed in this proceeding, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of civil penalty assessments, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of

such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violations, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

Citation No. 987853, October 19, 1981, 30 CFR 75.1715, states as follows:

> The check-in and check-out system at the mine did not provide positive identification of every person underground at the mine.

Citation No. 987854, October 19, 1981, 30 CFR 75.200, states as follows:

> The operator's roof control plan requiring roof bolts to be installed when loose or drummy roof are encountered was not being followed in that loose roof was present at one location in the No. 3 intake road way entry located about 300 feet inby the portal.

Citation No. 987855, October 20, 1981, 30 CFR 75.400, states as follows:

> Loose coal and float coal dust were deposited on rock dusted surfaces in the No. 2 belt conveyor entry beginning at the portal and extending inby for a distance of about 350 feet.

Citation No. 987857, October 20, 1981, 30 CFR 75.503, states as follows:

> The lights on the permissible type mark 20 Wilcox Continuous mining machine being used in the face area of 001 working section was inoperative.

Citation No. 987858, October 20, 1981, 30 CFR 75.523-1, states as follows:

> The Wilcox roof bolting machine in 001 working section was not provided with a deenergization device.

Citation No. 987859, October 20, 1981, 30 CFR 75.326, states as follows:

> The main intake and the conveyor coal haulage belt was not separated, in that rock had fallen and crushed out a portion of the 5th stopping inby the intake portal.

Citation No. 988361, October 21, 1981, 30 CFR 75.316, states as follows:

> The operator's ventilation methane and dust control plan requiring at least 20 water sprays to be operative on the Wilcox continuous mining machine was not being followed in that none of the water sprays were operating.

Citation No. 988364, October 21, 1981, 30 CFR 75.1103, states as follows:

> The sensor cable to the automatic fire warning devices on the No. 1 main belt conveyor was not maintained in that the sensor cable was broken in to and laying on the mine floor.

Citation No. 988365, October 23, 1981, 30 CFR 75.1725, states as follows:

> There were 14 bottom belt conveyor rollers stuck on the No. 1 Mine belt conveyor.

Citation No. 988367, October 26, 1981, 30 CFR 75.316, states as follows:

> The operator's ventilation methane and dust control plan requiring permanent stoppings up to and including the third open cross cut outby the face area was not being followed, in that permanent stoppings had not been installed in the third open cross cut outby the face area in first right 001 section.

Citation No. 988369, October 27, 1981, 30 CFR 75.400, states as follows:

> Loose coal and float coal dust was deposited on rock dusted surfaces beginning at the belt drive and extending inby for a distance of about 150 feet. This condition existed in the No. 2 entry 001 first right section.

Stipulations

The parties stipulated that the respondent's mine is subject to MSHA's enforcement jurisdiction (Tr. 5). In addition, the respondent indicated that it does not contest citations 987855, 988365, and 988367, and admits the fact of violations insofar as those citations are concerned (Tr. 6).

MSHA's testimony and evidence

MSHA Inspector Robert Sawyers confirmed that he inspected the mine in question in October 1981, and he confirmed that he issued all of the citations which are the subject of these proceedings. He testified as to the conditions and practices which he observed, and which led him to issue each of the citations. He also testified as to the negligence, gravity, and good faith abatement concerning each of the citations (Tr. 8-19; 19-28; 35-49; 50-68; 68-85).

Respondent's testimony and evidence

Mine operator Ralph Ball appeared pro se in this case and was given a full opportunity to present testimony and evidence in defense of all of the citations, including an opportunity to cross-examine the inspector as to all of his findings. Aside from the fact that he was not present on at least two occasions when the inspector conducted his inspections, Mr. Ball asserted that the citations resulted from the fact that he was in the process of moving his mining equipment from one underground mine area to another. However, he candidly admitted that on the days the citations issued work was in fact being performed in the mine and that the areas which were cited were active working areas of the mine (Tr. 94).

Inspector Sawyers testified that during the days of his inspections which resulted in the issuance of the citations in question in this case the mine was operating and producing coal. The haulage road was in use, the main belt conveyor haulage system was operational, the continuous mining machine was in operation cutting coal, and the roof bolter and other mine equipment was in use during the coal producing shifts (Tr. 53-57, 77, 21-35, 44). In addition, Mr. Sawyers indicated that the mine is still considered an active mine by MSHA (Tr. 83), and that if this were not the case he would not have conducted the inspections in question (Tr. 35)

Findings and Conclusions

Fact of violations

I conclude and find that the testimony and evidence adduced by MSHA in these proceedings establishes the fact of violations as to each of the citations issued, and all of the citations are therefore AFFIRMED.

Negligence

The inspector testified that the respondent had a mine foreman who was required to insure that all of the areas cited were preshifted or inspected sometime during the daily mining operations so as to preclude the conditions or practices cited (Tr. 11, 12, 22-23, 30, 69, 78). I conclude and find that the conditions cited resulted from the respondent's failure to exercise reasonable care, and that this failure on its part constitutes ordinary negligence as to all of the citations which have been affirmed.

History of prior violations

MSHA's counsel asserted that for the period October 19, 1979 to October 18, 1981, the mine had 8 citations issued against it, five of which were assessed civil penalties for which payment was made (Tr. 90). Respondent's prior history of violations appears to indicate a satisfactory safety record for an operation of its size, and I cannot conclude that additional increases in the assessments made are warranted.

Good Faith Abatement

Inspector Sawyers testified that with the exception of Citation No. 987854, all of the remaining citations were abated within the time fixed and that the respondent demonstrated good faith compliance (Tr. 9-12, 15, 29, 37, 53, 69, 78).

With regard to Citation No. 987854 for failure to roof bolt a loose roof area in the roadway, Mr. Sawyers testified that he gave the respondent until the next morning to bolt the area. However, when he returned the next morning and found that the bolting had not been done, he was concerned that the loose roof could fall and therefore issued an order. Abatement was then immediately achieved (Tr. 22). In defense of this lack of timely abatement, Mr. Ball testified that it took longer than the time originally fixed by the inspector because roof bolting equipment had to be moved down to the area of loose roof (Tr. 26). The inspector did not dispute this fact, but there is nothing to suggest that anyone from mine management indicated that more time was required to abate the loose roof conditions (Tr. 27).

In view of the foregoing, I conclude and find that all of the conditions and practices cited by the inspector in this case were corrected by the respondent in good faith and timely compliance was achieved. With

regard to the situation which necessitated the issuance of an order to achieve compliance, I have considered the fact that the equipment necessary to achieve rapid compliance had to be moved to the affected roof area and that immediate compliance was then achieved. Under these circumstances, and in view of the inspector's agreement with the fact that an equipment problem may have existed, I cannot conclude that the respondent exhibited a total lack of good faith in achieving compliance once the order issued.

Gravity

Citation 988367

The inspector indicated that the conditions cited could have resulted in a serious interruption to the mine ventilation (Tr. 9).

Citation 988365

The inspector stated that stuck rollers constitute a fire hazard in that they could heat up when not turning properly, and while the mine is wet, a fire hazard was still present (Tr. 10-11).

Citation 987855

The Inspector indicated that the loose coal and float coal in the cited areas presented a possible fire or explosion hazard in the event methane or float coal dust were present. Although he detected no methane, he still considered the conditions cited to be hazardous (Tr. 12-13).

Citation 987853

The inspector believed that the lack of a positive individual miner identification system did not per se present any danger, and was not likely to cause any injury (Tr. 15).

Citation 987854

The inspector stated that the lack of roof bolts at the loose roof area on the roadway where men and equipment traveled presented a dangerous situation and exposed miners to possible injuries or death (Tr. 21).

Citation 987857

The inspector believed that the lack of lights on the continuous mining machine exposed anyone in the area to a possible hazard since all they would have for illumination would be their cap lamps (Tr. 29-31).

Citation 987858

The inspector believed that the lack of a "panic bar" on the roof bolting machine would prevent the operator from stopping or controlling

it sufficiently in the event of any emergency. The machine had been used to bolt the roadway, and the machine operator would have been exposed to a hazard if the machine were in motion and could not be stopped (Tr. 38-40).

Citation 987859

The inspector stated that the rock fall here crushed out a portion of the ventilation stopping, thereby resulting in the interruption to the mine ventilation system in that no separation was maintained between the intake and return aircourses. This could have short-circuited the ventilation (Tr. 54).

Citation 988361

The inspector indicated that the lack of required water sprays on the miner prevented the proper suppression of mine dusts, and the miners would be exposed to this dust (Tr. 56-57).

Citation 988364

The inspector believed that the broken sensor cable to the automatic fire warning device on the same belt which had stuck rollers presented a hazard in that in the event of a fire the sensor would not give any warning or activate the surface warning device (Tr. 68-71).

Citation 988369

The inspector indicated that the presence of loose coal and float coal dust at the belt drive and entry in question presented a possible explosion hazard which would have affected the eight men on the section (Tr. 78-79).

In view of the foregoing testimony and evidence presented by the inspector, I conclude and find that all of the citations except for one constituted serious violations of the cited safety standards. I conclude that citation 987853 is nonserious.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Remain in Business

Inspector Sawyer testified that at the time the citations issued, the mine was operating two production shifts and one maintenance shift, employing approximately eight miners on each of the production shifts (Tr. 17; 81). He also indicated that the mine was first opened in 1979, and was operated by a prior owner (Tr. 51). Mine production was approximately 140 tons of coal a shift and when he last visited the mine in June 1982, mine production was down to one shift (Tr. 82). The mine is still active, and respondent is still in the mining business (Tr. 83).

Mine operator Ball testified that he became the operator of the mine when he leased it on July 1, 1981, and he confirmed that mine production averaged about 140 tons of coal for each production shift, or approximately 280 tons a day when the mine is working (Tr. 86-87).

Mr. Ball testified that it could be difficult for him to pay the civil penalties proposed by MSHA in this case because he is not producing or selling as much coal as he has in the past. Due to the depressed coal market, he is not certain that he can remain in business for the "next few weeks" (Tr. 87-90).

MSHA's counsel stated that she had no reason to question the economic state of respondent's mining operation, and that the inspector confirmed that he observed little mining activity going on when he last visited the mine and that mine production had been reduced (Tr. 91).

I conclude and find that the respondent is a small mine operator. Although respondent did not produce any credible evidence to support a conclusion that the assessment of civil penalties will put him out of business, his testimony that his mining operation is marginal remains unrebutted by the petitioner. Further, the asserted decrease in mine production is supported by the testimony of the inspector.

It is clear that in litigated civil penalty proceedings, the determination of appropriate civil penalty assessments for proven violations is made on a de novo basis by the presiding judge and he is not bound by any assessment method of computation utilized by MSHA's Assessment Office, Boggs Construction Company, 6 IBMA 145 (1976); Associated Drilling Company, 6 IBMA 217 (1976); Gay Coal Company, 7 IBMA 245 (1977); MSHA v. Consolidated Coal Company, VINC 77-132-P, IBMA 78-3, decided by the Commission on January 22, 1980.

In the instant proceedings, the initial civil penalty assessments which appear as part of the petitioner's initial pleadings and civil penalty proposals in the form of "assessment worksheets" as exhibits to the proposals, reflect proposed penalty amounts derived from the application of "points" assessed for each of the statutory criteria set out in section 110(i) of the Act, made pursuant to Part 100, Title 30, Code of Federal Regulations. It is clear that I am not bound by those initial assessments, and the penalty assessments which I have imposed have been made after full consideration of the record evidence concerning the respondent's small size, its reduced mine production, and its marginal mining operation, as well as the other statutory criteria found in section 110(i) of the Act.

Penalty Assessments

On the basis of the foregoing findings and conclusion, and taking into account the requirements of section 110(i) of the Act, I conclude that the following civil penalty assessments are appropriate for the citations which have been affirmed:

Citation No.	Date	30 CFR Section	Assessment
987853	10/19/81	75.1715	$ 10
987854	10/19/81	75.200	100
987855	10/20/81	75.400	40
987857	10/20/81	75.503	15
987858	10/20/81	75.523-1	30
987859	10/20/81	75.326	45
988361	10/21/81	75.316	35
988364	10/21/81	75.1103	42
988365	10/23/81	75.1725	60
988367	10/26/81	75.316	35
988369	10/27/81	75.400	30
			$ 442

ORDER

Respondent IS ORDERED to pay civil penalties in the amounts shown above within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner this matter is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Carole M. Fernandez, Esq., U.S. Department of Labor, Office of the Solicitor, 280 U.S. Courghouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Ralph Ball, President, Sterling Energy, Inc., P.O. Box 407, Corbin, KY 40701 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 82-27-M
Petitioner	:	A/O No. 20-00603-050015-A
v.	:	
	:	Docket No. LAKE 82-28-M
HILLARD BENTGEN,	:	A/O No. 20-00608-05017-A
GRANT MACKLIN,	:	
RUSSELL HEEMAN,	:	Docket No. LAKE 82-29-M
Respondents	:	A/O No. 20-00608-050019-A
	:	
	:	Ottawa Silica Company
	:	Michigan Division Quarry and Mill

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Frank X. Fortescue, Esq., Brown, McGlynn, Fortescue and Smith, Bloomfield Hills, Michigan, for Respondents.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Petitions were filed in each of the above cases under section 110(c) of the Federal Mine Safety and Health Act of 1977, alleging that each of the Respondents, acting as agent of the Ottawa Silica Company, a corporate mine operator, knowingly authorized, ordered, or carried out a violation of the mandatory standard contained in 30 C.F.R. § 56.9-2 committed by the mine operator between October 31, 1980 and November 25, 1980. On motion of Petitioner, the three cases were consolidated for hearing and decision since they involved the same corporate mine operator and the same violation is charged against each Respondent.

Pursuant to notice, the case was heard on the merits in Detroit, Michigan, on August 4, 1982. Erwin Nowitzke, Ronald J. Baril and Russell Spencer testified on behalf of Petitioner. Peter Roan and Hillard Bentgen testified on behalf of Respondents. Counsel for Petitioner and Respondents waived their rights to file posthearing briefs and each submitted oral arguments on the record at the close of the testimony. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Ottawa Silica Company at all times pertinent hereto was the operator of a mine in Wayne County, Michigan, known as the Michigan Division Quarry and Mill, the products of which entered interstate and foreign commerce. Ottawa Silica Company is a Delaware Corporation with headquarters in Ottawa, Illinois.

2. At all times pertinent hereto, Respondent Hillard William Bentgen was employed by Ottawa Silica Company as Industrial Relations Safety Supervisor at the Michigan Division Quarry and Mill.

3. At all times pertinent hereto, Respondent Grant Macklin was employed by Ottawa Silica Company as pit foreman at the Michigan Division Quarry and Mill.

4. At all times pertinent hereto, Respondent Russell Heeman was employed by Ottawa Silica Company as maintenance foreman at the Michigan Division Quarry and Mill.

5. Ottawa Silica Company owned and used a piece of equipment known as a Grove Cherry Picker Crane #33. This was a large crane with four rubber tired wheels. It weighed between 15 and 20 tons, and had a lifting capacity of 14 tons. There were brakes on all four wheels.

6. Ottawa Silica Company required all employees operating powered industrial equipment, including the cherry picker, to complete and submit each day a form called Mobile Equipment Daily Operator Inspection.

7. At all times pertinent hereto, the employee who operated the Grove Cherry Picker Crane #33 at the subject mine was Erwin Nowitzke.

8. The report submitted by Nowitzke on October 30, 1980, indicated a defect in the emergency brake at the beginning and end of the shift. No defect was noted in the service brakes. On the reports submitted beginning October 31, 1980 and continuing through November 24, 1980, a defect was noted in the service brakes both at the beginning and the end of each shift. Thirteen such reports were submitted during that period of time. In addition to the written reports, Nowitzke orally complained of the brakes to his supervisors.

9. The reports referred to above were submitted to the mine office. They were turned over to Respondent Bentgen. After the first such report, Bentgen talked to the mechanics. Brake fluid was added to the service brakes. As the reports continued to indicate a defect, Bentgen was told that the brakes tended to fade after use, and could be brought back to an acceptable level by adding fluid. At some time between October 31, 1980 and November 6, 1980, the master cylinder was replaced, but the problem continued.

10. Ottawa Silica's mechanics were unable to fix the brakes so Contractors Machinery Company, which sold and serviced construction equipment, was called on November 6, 1980.

11. The Contractors Machinery Company representative found defective seals in the front wheel cylinders. Because parts had to be ordered, the brakes were "blocked off," that is, rendered entirely inoperative. This was done with the knowledge and authorization of Ottawa Silica officials. New parts were ordered by Contractors Machinery.

12. Respondents Bentgen, Macklin and Heeman were aware that the brakes had been blocked off on the Grove cherry picker crane at the time or shortly after this was done.

13. The Grove cherry picker crane in question was operated on sand and gravel surfaces some of which were roughly graded, and had bumps. It traversed a long curved hill with a pond at the bottom and a dropoff at the side of 50 to 60 feet. Other vehicles travelled in the area including pick up trucks. The crane had a normal speed when empty of 10 to 20 miles per hour. When loaded, it would travel 5 to 10 miles per hour. Where Nowitske travelled down a grade, he tried to keep the speed down to 2 to 3 miles per hour.

14. While the crane was carrying a load up or down the travelway described above, the rear wheels would sometimes be raised off the ground on striking a bump in the road. When the rear wheels were off the ground, the crane had no brakes at all after the front brakes were blocked off. On occasion, during this time, it was necessary for the crane operator to shift into reverse gear to slow the crane down.

15. During the period in question, Nowitzke was not involved in any accident with the crane, nor did he ever lose control of the vehicle.

16. On one or more occasions subsequent to November 6, 1980, Nowitzke was directed by Respondent Macklin to operate the crane to pick up and carry pumps to and from the pit. These weighed from 400 pounds for small pump motors to over 1,000 pounds for sand pump motors. Macklin was aware that the front brakes were blocked off during this time.

17. On one or more occasions subsequent to November 6, 1980, Nowitzke was directed by Respondent Heeman to operate the crane. Heeman was aware that the front brakes were blocked off during this time.

18. Respondent Bentgen knew that the crane was being operated after its front brakes were blocked off. Bentgen told Macklin and Heeman that in his opinion the crane was safe to operate.

19. On November 25, 1980, Federal Mine Inspector Ronald J. Baril, a duly authorized representative of the Secretary of Labor, issued a citation to the Ottawa Silica Company charging a violation of 30 C.F.R. § 56.9-2. The citation alleged that the company was aware that Grove cherry picker No. 33 had defective brakes which should have been corrected on October 31, 1980, or the machine should have been removed from service. It further alleged that equipment operator inspection forms had reported the defect from October 31, 1980 on 13 separate work days.

20. The citation referred to above was terminated on the day it was issued when the Safety Manager informed company supervision that they must review the employee equipment reports and correct defects affecting safety. The brakes were repaired on November 26, 1980, and the cherry picker crane was returned to service.

21. MSHA assessed a penalty of $1,000 against Ottawa Silica Company for the alleged violation and the assessment was paid in September, 1981.

STATUTORY PROVISION

Section 110(c) of the Act provides in part as follows:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act . . ., any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation, failure or refusal shall be subject to the same civil penalties . . . that may be imposed upon a person under subsection[s] (a) . . . .

REGULATORY PROVISION

30 C.F.R. § 56.9-2 provides as follows: "Equipment defects affecting safety shall be corrected before the equipment is used."

ISSUES

1. Whether the corporate operator, Ottawa Silica Company, violated the mandatory safety standard charged in the citation involved herein?

2. If the corporate operator violated the safety standard charged, in the case of each Respondent, did he, acting as an agent of the corporation, knowingly authorize, order, or carry out such violation?

3. If Respondents or any of them did knowingly authorize, order, or carry out the violation, what is the appropriate penalty therefor?

CONCLUSIONS OF LAW

1. Ottawa Silica Company violated the mandatory safety standard contained in 30 C.F.R. § 56.9-2 in failing to correct the defective brakes on the Grove cherry picker crane #33 during the period October 31, 1980 to September 25, 1981, while it continued to operate the crane.

DISCUSSION

There is no question that the crane had defective brakes: from October 31, 1980 to November 6, 1980, the front wheel cylinders leaked and the brakes lost their holding power each day while being used. From November 6 to November 25, the front brakes were blocked off and entirely inoperative. Respondents contend that the defect did not affect safety. This flies in the face of common sense. The vehicle was equipped with four wheel brakes and obviously having brakes on only the rear wheels seriously diminished the ability of the operator to stop. The most important evidence in this regard is the testimony of Mr. Nowitzke, the equipment operator. He stated that he considered driving the crane without brakes to be hazardous, especially when lifting and carrying loads. The crane operator and other employees working or travelling in the area of the crane were endangered by the defective brakes.

2. Each of the Respondents was an agent of Ottawa Silica Company, a corporation, during the months of October and November, 1981.

3. Respondent Grant Macklin and Respondent Russell Heeman knowingly ordered the crane operator to use the crane without having the defective brakes corrected. They thereby knowingly ordered the commission of the violation found herein to have been committed by the corporate operator.

4. Respondent Hillard Bengten, the Safety Director of the corporate operator, knowingly authorized the use of the crane without having the defective brakes corrected. He thereby knowingly authorized the violation found herein to have been committed by the corporate operator.

DISCUSSION

There is no question but that each of the Respondents knew that the crane had defective brakes. I conclude further that each of them knew or should have known that this was a defect affecting safety. It is not necessary in order to establish a violation under section 110(c) that wilfullness or bad faith be shown. See Secretary v. Kenny Richardson, 1 FMSHRC 8 (1981).

5. The violation was a serious one in the case of each Respondent, and very serious in the case of Respondent Bentgen who was responsible for seeing to the safety of all employees at the plant. The defect was an obvious one, known to all Respondents for many days and reported orally and in writing on many occasions by the equipment operator.

6. There is no evidence in the record concerning the ability or lack of ability of any of the Respondents to pay penalties that may be assessed.

7. After the violation was cited against the operator, it was promptly abated and, so far as the record shows, each of the Respondents cooperated in the abatement.

8. I conclude that appropriate penalties for the knowing violations should be imposed as follows: on Respondent Bentgen, $700; on Respondent Macklin, $500; on Respondent Heeman, $500.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. That within 30 days of the date of this decision, Respondent Hillard Bentgen pay the sum of $700 as a civil penalty for the violation found herein to have occurred;

2. That within 30 days of the date of this decision, Respondent Grant Macklin pay the sum of $500 as a civil penalty for the violation found herein to have occurred;

3. That within 30 days of the date of this decision, Respondent Russell Heeman pay the sum of $500 as a civil penalty for the violation found herein to have occurred.

James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution: By certified mail

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Frank X. Fortescue, P.C., Brown, McGlynn, Fortescue and Smith, Attorneys at Law, 500 North Woodward, Suite 320, Bloomfield, Hills, MI 48013-7164

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. LAKE 82-27-M
	:	A/O No. 20-00608-050015-A
v.	:	
	:	Docket No. LAKE 82-28-M
HILLARD BENTGEN,	:	A/O No. 20-00608-05017-A
GRANT MACKLIN,	:	
RUSSELL HEEMAN,	:	Docket No. LAKE 82-29-M
Respondents	:	A/O No. 20-00608-050019-A
	:	
	:	Ottawa Silica Company
	:	Michigan Division Quarry and Mill

CORRECTIONS TO DECISION
ISSUED OCTOBER 26, 1982

On page 5, Conclusion of Law No. 1 should read as follows:

1. Ottawa Silica Company violated the mandatory safety standard contained in 30 C.F.R. § 56.9-2 in failing to correct the defective brakes on the Grove cherry picker crane #33 during the period October 31, 1980 to November 25, 1980, while it continued to operate the crane.

On page 5, Conclusion of Law No. 2 should read as follows:

2. Each of the Respondents was an agent of Ottawa Silica Company, a corporation, during the months of October and November, 1980.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution: By certified mail

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FALLS CHURCH, VIRGINIA 22041

CONSOLIDATION COAL COMPANY, Contestant-Respondent	:	Contest of Citation
	:	Docket No. WEVA 82-30-R
v.	:	Citation No. 861598; 9/24/81
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner-Respondent	:	McElroy Mine
	:	Civil Penalty Proceeding
	:	Docket No. WEVA 82-120
	:	A.O. No. 46-01437-03115
	:	McElroy Mine

DECISIONS

Appearances: Robert Vukas, Esquire, Pittsburgh, Pennsylvania, for Consolidation Coal Company; Janine C. Gismondi, Attorney, U.S. Department of Labor, Philadelphia, Pennsylvania, for MSHA.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a citation issued by an MSHA inspector pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, charging the Consolidation Coal Company with an alleged violation of mandatory health or safety standard 30 CFR 70.207(a). Docket WEVA 82-30-R is the Contest filed by Consolidation Coal challenging the legality of the citation, and Docket WEVA 82-120, is the civil penalty proposal filed by MSHA seeking a civil penalty assessment for the alleged violation. The cases were consolidated for trial in Washington, Pennsylvania, on July 14, 1982, and the parties appeared and participated fully therein. Consolidation Coal filed a post-hearing brief, but MSHA did not. However, I have considered the oral arguments made by both counsel during the course of the trial, as well as Consolidation Coal's written brief, in the course of these decisions.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1077 Act, 30 U.S.C. § 820(i), which requires consideration of the following criteria before a civil penalty may be assessed for a proven violation: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Issues

The issues presented in these proceedings includes the following: (1) whether the conditions or practices cited by the inspector on the face of the citation constituted a violation of the cited mandatory safety standard, (2) whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other safety or health hazard, and if such violation was caused by the unwarrantable failure of the operator to comply with the mandatory health or safety standard, (3) the appropriate civil penalty which should be assessed against the operator for the alleged violation based upon the criteria set forth in section 110 of the Act. Additional issues raised are identified and disposed of where appropriate in the course of these decisions.

Stipulations

The parties stipulated to the following (Tr. 4-5):

1. The McElroy Mine is owned and operated by the Consolidation Coal Company.

2. The respondent and the mine are subject to the jurisdiction of the Act and the Commission.

3. Citation No. 871598 was properly served on the respondent by a duly authorized representative of the Secretary of Labor.

4. The McElroy mine produces approximately 1,419,120 tons of coal annually.

5. The assessment of a civil penalty in this case will not adversely affect the respondent's ability to continue in business.

Discussion

The citation issued by the inspector in this case, No. 861598, September 24, 1981, (Exhibit G-1), describes the condition or practice cited as a violation as follows:

Only one of the five required valid respirable dust samples were taken by the operator from the 036 continuous miner operator designated occupation on the 079-0 4D mechanized mining unit for the July-August 1981 bimonthly sampling cycle, as evidenced by Advisory No. 0029 dated September 8, 1981. According to mine records, there were 65 production shifts from July 1 to August 18, 1981 when production on this section temporarily ceased. John Kulavik, Health and Safety Technician, stated that sampling for this section was scheduled for August 18-24, 1981, but after sampling on 8-19-81 was informed that this section was shut down immediately due to needing air for a new longwall on 1 South face section.

MSHA's testimony and evidence

John M. Dower, MSHA Mining Engineer, testified as to his mine training and experience, and he indicated that his duties include the inspection of mines. His current duties include the inspection and investigation of respirable dust and noise problems in underground mines in MSHA's District 3. Mr. Dower confirmed that he issued citation 861598 on September 24, 1981, and served it on John Kulavik, respondent's health and safety technician employed at the McElroy Mine (Tr. 8-12; Exhibit G-1).

Mr. Dower stated that he issued the citation on the basis of a September 8, 1981, MSHA "advisory" computer print-out which indicated that for the bi-monthly respirable dust sampling cycle period July through August 1981, only one sample had been received. The regulations require that five valid designated occupation samples be taken and submitted. The occupation samples required were for the 036 continuous miner operator, operating in the 079-0 mechanized mining unit (Tr. 12-15; Exhibit G-2).

Mr. Dower testified that when he spoke with Mr. Kulavik at the mine on September 24, 1981, he confirmed that only one respirable dust sample was taken of the miner operator in question during the July-August sampling period and that this sample is reflected on the "advisory" as cassette number 43877984. Mr. Dower stated further that according to the mine records there were 65 production shifts from July 1 to August 18, 1981, when production ceased on the 4-D section. He also indicated that the purpose of sampling is to assure that the mine ventilation methane and dust control systems are adequate to control any miners respirable dust exposure to a level at or below 2.0 milligrams per cubic meter in any 8-hour work shift (Tr. 15-16).

On cross-examination, Mr. Dower testified that his inspection confirmed that the 079-0 mechanized mining unit was located on the 4-D section. He also confirmed that during the time period in question the section was operating three shifts a day, and that Mr. Kulavik was the person performing dust sampling for the mine. Mr. Dower did not know when the 65 production shifts in question took place, and he did not check the records in this regard. He also stated that he did not check Mr. Kulavik's dust sampling schedule to determine what he was doing during the shifts in question (Tr. 17-18).

Mr. Dower explained the procedures used to take the required dust samples, and he confirmed that MSHA's District Manager may require a mine operator to submit its proposed sampling procedures. Once the plan is placed in writing and submitted to MSHA, the operator must inform the district office of any mine operational change of status which may preclude the taking of samples. Mr. Dower confirmed that Mr. Kulavik advised him that he took only one sample on August 18, and took no others because the section in question was shut down for the remainder of the month of August. However, Mr. Dower did not know whether Mr. Kulavik submitted an operational status change form showing that it was going to be impossible to sample the section, nor could he recall checking MSHA's records to determine whether he did or not (Tr. 18-23).

Mr. Dower stated that he checked the mine operational records and confirmed that section 4-D was not a producing section for the period August 18 through 31, and he confirmed that the regulations require that five valid samples be taken only on a production shift (Tr. 24).

Consolidation Coal Company's testimony and evidence

John Kulavik, testified that during July and August 1981, he was responsible for the taking of respirable dust and noise samples at the mine. He stated that the first two weeks of July was the miner's vacation period, and that it ended on July 12. He was not at work during the subsequent week due to a death in his family. He started sampling the long wall section during the last week of July through August 11th. He indicated that he submitted an operational status change for the 4-D section after production on that section was shut down, and he stated that he started sampling on that section late because of vacations and personal reasons. During his nine years of taking samples, the citation issued in this case was the first one he has received for non-compliance (Tr. 77-80).

Mr. Kulavik explained that 40 of the 65 shifts noted by the inspector were shifts during the period after the miner's vacation to the end of July, and that he spent his time sampling the longwall section (Tr. 81). He also conducted noise surveys during May and June (Tr. 82).

In response to questions from the bench, Mr. Kulavik confirmed that he was first notified of mine management's decision that section 4-D was to be shut down after he came out of the mine on the midnight shift on August 18th, and at that time he had taken one dust sample on the morning shift (Tr. 86). The 4-D section was shut down until August 31, and it reopened on that day (Tr. 87), and it remained in production during the months of September and October. He sampled during these two months, and the section was in compliance (Tr. 88). The 4-D section was also in compliance during the months of May and June (Tr. 88).

Mr. Kulavik stated that he discussed the citation in question with the inspector, and his understanding of the reason for the citation was

the inspector's belief that he should have sampled during the 65 shifts which had passed (Tr. 91). Mr. Kulavik indicated that had he known in advance that the 4-D section would be shut down he would have rearranged his sampling scheduled, but that he had no role in the decision to shut the section down (Tr. 91).

Consol's Arguments

Respondent-contestant Consolidation Coal Company (Consol), takes the position that the cited standard has not been violated in this case because Consol had two full months within which to take the required respirable dust samples. Since the 4-D Section was not in production after August 18, Consol argues that the inspector acted prematurely in issuing the citation, and that compliance was impossible because the section had been shut down (Tr. 24-28). In short, Consol takes the position that under the mandatory standard in question it has a full two months within which to take its samples, and that it has the discretion and option of scheduling sampling at anytime during the two months sampling period (Tr. 63-64; 67-68).

MSHA's Arguments

MSHA counsel conceded that the standard, on its face, allows a mine operator to schedule its respirable dust sampling at any time during any bi-monthly sampling period. However, counsel argued further that a mine operator must advance some legitimate reason for ceasing production on a section, thereby excusing itself from the requirement that it take and submit five valid respirable dust samples. Counsel also argued that any shut-down or cessation of production must be made in good faith and that a shut down in production for the purpose of avoiding compliance with the dust sampling requirements of the regulation should not be permitted (Tr. 28-34). On the facts of this case, MSHA's counsel takes the position that since 65 production shifts elapsed from July 1, 1981, to the day the section ceased production, Consol had ample time to take and submit the required respirable dust samples (Tr. 43).

MSHA's counsel argued further that the Act, as well as the cited regulation, imposes strict liability on a mine operator, and even though the standard permits an operator a full two months within which to take its respirable dust samples, when the operator decides to shut down production it must show that the shut down was made in good faith and not for the purpose of avoiding compliance, and that the shut down was occasioned by circumstances which were unforeseen and outside its control (Tr. 44). Even if it can establish these two factors, MSHA's counsel nonetheless takes the position that if the samples are not taken, a violation is established, but that the two factors may be considered in mitigation of any civil penalty which may be assessed for the violation (Tr. 45-46).

MSHA's counsel conceded that section 70.220 puts the burden on a mine operator to notify MSHA when there is a change in the operational

status of the mine. Assuming that an operator advised MSHA that it intended to take its dust samples during the last two weeks of August, counsel conceded further that a citation for failure to take samples could not be issued before the expiration of the full two month period (Tr. 73-74).

Findings and Conclusions

In this case Consol is charged with a violation of mandatory standard 30 CFR 70.207(a), which provides in pertinent part as follows:

> (a) Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period beginning with the bi-monthly period of November 1, 1980. Designated occupation samples shall be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days. The bimonthly periods are:
>
> January 1 - February 28 (29)
> March 1 - April 30
> May 1 - June 30
> July 1 - August 31
> September 1 - October 31
> November 1 - December 31

Inspector Dower testified that the mine in question has an excellent record and that the one respirable dust sample which was submitted, and which reflected 0.7, was well within the compliance range required by the standard (Tr. 38, 42). He also indicated that he did not know what Consol's past dust inspection routine practice was at the mine in question (Tr. 41). He also conceded that Mr. Kulavik advised him that he had no prior knowledge that the 4-D section would be shut down during the scheduled sampling period (Tr. 59). As for any MSHA policy guidelines concerning the application of section 70.207(a), MSHA's counsel confirmed that the existing policy does not address the issue of any possible extenuating circumstances that would permit an operator not to take the required dust samples without leaving itself open to a citation for noncompliance (Tr. 76).

The facts in this case show that the first dust sample taken by Mr. Kulavik was on August 18. The section was then shut down, and Inspector Dower confirmed that from August 18 through 31, which constituted the remainder of the sampling period, the section was not in production. Since it was not a producing section, the remaining four samples were not required to be taken.

On the facts of this case, MSHA has advanced no credible evidence to support a conclusion that mine management had arbitrarily shut down the

section simply to avoid the taking of the required samples. Mr. Kulavik impressed me as a competent respirable dust technician and I find him to be a completely straightforward and credible witness. I am particularly impressed with his unrebutted testimony that in the nine years he has been sampling dust in the mine, the instant citation for noncompliance was his first one, and the one sample which he did take indicated that the mine was in compliance.

MSHA's position of absolute liability even though an operator can establish that it acted in good faith by shutting down production and that the circumstances surrounding the shutdown were beyond its control is rejected. The fact that a number of working shifts had elapsed prior to the shut down is not persuasive, particularly where the standard itself allows an operator a full two months to take samples, and particularly where MSHA conceded that a citation may not issue before the expiration of the two month sampling cycle. In this case, Mr. Kulavik indicated that had he known in advance that the section would have been shut down, he would have arranged to take the required samples before the shut down. Since he had no control over the shut down and had no decision making authority in that regard, I conclude and find that he did act in good faith, and did not fail to take the samples simply to avoid compliance.

While it is true that section 70.220(a) requires a mine operator to report any operational changes that affects the respirable dust sampling requirements, Consol is not charged with a violation of that standard.

ORDER

In view of the foregoing findings and conclusions, I find that MSHA has failed to establish a violation of the standard cited in the section 104(a) Citation No. 861598, issued on September 24, 1981, and it IS VACATED and the civil penalty proposal filed against Consol in Docket No. WEVA 82-120 is DISMISSED. Further, Consol's Contest filed in Docket WEVA 82-30-R is sustained, but in view of my disposition of the civil penalty case that matter is terminated.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

VIRGINIA POCAHONTAS COMPANY, Contestant	: Contest of Citations		
	: Docket Nos.	Citation Nos.	Date
v.	:		
	: VA 79-131-R	696067	8/17/79
SECRETARY OF LABOR,	: VA 79-137-R	696089	8/17/79
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	: Virginia Pocahontas No. 2 Mine		

DECISION AFTER REMAND AND ORDER OF DISMISSAL

Counsel for contestant filed on October 19, 1982, in the above-entitled proceeding a motion to dismiss the notices of contest with the understanding that the dismissal will not prejudice contestant's rights in any civil penalty proceeding arising from the same citations which were the subject of the notices of contest. Section 2700.22 of the Commission's procedural rules, 29 C.F.R. § 2700.22, provides that the failure to file a notice of contest of a citation "* * * shall not preclude the operator from challenging the citation in a penalty proceeding." An operator who has filed a notice of contest and who has subsequently asked that it be dismissed should be no less entitled to challenge the citation in a civil penalty proceeding than one who has not filed such a notice at all. Therefore, I conclude that dismissal of the notices of contest in this proceeding will be without prejudice to contestant's rights in any civil penalty proceeding which may develop at some future time.

In an order issued May 20, 1982, the Commission remanded these cases to me for further proceedings consistent with the decision of the United States Court of Appeals for the District of Columbia Circuit in United Mine Workers of America v. Federal Mine Safety and Health Review Commission, 671 F.2d 615 (1982), cert. denied, No. 82-33, October 12, 1982. My original decision (2 FMSHRC 2586 (1980)) in this proceeding vacated Citation Nos. 696067 and 696089 because they had the effect of requiring contestant to pay a miners' representative for accompanying an inspector during a "spot" inspection. My decision had followed the precedent enunciated by the Commission's decisions in The Helen Mining Co., 1 FMSHRC 1796 (1979), and Kentland-Elkhorn Coal Corp., 1 FMSHRC 1833 (1979), in which the Commission had held that operators do not have to pay miners' representatives for accompanying inspectors who are engaged in making "spot" inspections. The Commission's decisions in The Helen Mining and Kentland-Elkhorn cases were reversed by the court in the UMWA case, supra.

In the circumstances described above, it appears to me that granting the motion to dismiss without reinstating the citations might leave some doubt as to the prospective status of the citations. Inasmuch as my original decision had granted the notices of contest at the same time as the

citations were vacated, it is possible that granting the motion to dismiss would have the implied effect of reinstating the citations, but the procedure which will remove all doubt as to the present validity of the citations under the court's UMWA decision, supra, is for me specifically to reinstate the citations. Therefore, my order will hereinafter reinstate the citations as well as grant the motion to dismiss the notices of contest.

WHEREFORE, it is ordered:

(A) Paragraph (B) of the order accompanying my decision issued September 11, 1980, in this proceeding (2 FMSHRC at 2588) is rescinded and Citation Nos. 696067 and 696089 dated August 17, 1979, are reinstated.

(B) The motion to dismiss filed by contestant on October 19, 1982, is granted.

(C) The notices of contest filed in Docket Nos. VA 79-131-R and VA 79-137-R are dismissed and this proceeding is terminated.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 81-63
Petitioner	:	Assessment Control
	:	No. 44-04460-03014
v.	:	
	:	No. 1 Mine
S & P COAL COMPANY,	:	
Respondent	:	

DECISION AND ORDER OF DISMISSAL

Counsel for the Secretary of Labor filed on October 22, 1982, a motion for approval of settlement. Under the settlement agreement, respondent would pay a reduced penalty of $5 instead of the penalty of $38 proposed by the Assessment Office for the single violation of 30 C.F.R. § 70.208(a) which is involved in this proceeding.

The motion for approval of settlement gives the following reason for reducing the penalty proposed by the Assessment Office (p. 2):

> Citation No. 9924829 was issued when MSHA records indicated that the operator had failed to submit a valid respirable dust sample. A civil penalty of $38 was proposed, but it is believed that it should be reduced to $5.00 as the operator's negligence is very low. It was discovered that the operator had submitted a respirable dust sample. However, in transmitting the sample the operator indicated the incorrect section number for the sample, resulting in an invalidation of the sample by MSHA's computer. As the sampling period had passed, the operator was unable to submit the necessary sample. While the operator was somewhat negligent in submitting the sample in an incorrect form, thus rendering it invalid, it is felt that the negligence involved was very low thus warranting the proposed reduction. In addition, the gravity of such a violation, essentially a bookkeeping one, is extremely low further justifying the proposed settlement. The good faith of the operator was normal. The operator is small, payment of the proposed penalty will have no effect on the operator's ability to remain in business. In the 24 month period prior to the issuance of this citation the operator had a history of 10 assessed violations, a good history.

Respondent's answer to the show-cause order issued in this proceeding states as follows:

> The reason why we disagree with the violation is we sent in a dust sample on this section, but in filling out the dust card, we made a mistake on the number. Instead of 200-0, we put 200-2.

This is only a small 1 section mine. The sample was voided. When a sample is voided, we are notified. Another sample is taken and sent in. We were never notified. I got M.S.H.A. office in Richlands, Va., to trace it to find out what happened. We were issued a violation by Richlands Office by direction of Computer. Therefore, we don't think we deserved this violation.

In Co-Op Mining Co., 2 FMSHRC 3475 (1980), the Commission reversed an administrative law judge's decision which had accepted a settlement agreement in circumstances very similar to those which exist in this proceeding. In the Co-Op case, a respondent had submitted a respirable dust sample for an employee who did work for it but had not submitted a sample for a person who MSHA mistakenly thought worked for respondent. The Commission said that no violation of section 70.250(b) had occurred in that case. The Commission observed that the deterrent effect of paying penalties would not be advanced by having a penalty paid for a violation which had not occurred.

Section 70.208(a) provides as follows:

(a) Each operator shall take one valid respirable dust sample from each designated area on a production shift during each bimonthly period beginning with the bimonthly period of December 1, 1980. * * *

The violation here involved was for the first bimonthly period referred to in section 70.208(a), that is, from December 1, 1980, to January 31, 1981. Both the motion for approval of settlement and respondent's answer to the show-cause order agree that the respirable-dust sample was taken and submitted to MSHA for the bimonthly period beginning December 1, 1980. The provisions of section 70.208(a) were complied with when respondent took the respirable-dust sample and submitted it within the required sampling period. The only mistake respondent made was in writing "200-2" on the dust card instead of "200-0". Since MSHA's computer had been programmed to give respondent credit for submitting a sample for section 200-0, it naturally rejected a sample bearing the number "200-2".

Inasmuch as the sample here involved appears to be the very first submittal required by section 70.208(a), it is understandable that respondent may have thought the proper designation to enter on the dust card was "200-2". Respondent's answer to the show-cause order notes that it is customary for it to be advised when MSHA voids a sample so that a new sample may be submitted, but respondent states that it was not advised of the fact that its sample had been voided by the computer.

It is true that section 70.208(a) provides that "each operator shall take one valid respirable dust sample" [Emphasis supplied.]. It would be possible to argue that a dust sample is not "valid" unless it has been given the correct section number by the operator. If an operator were to persist in submitting its samples with an incorrect number on them for two or three bimonthly periods in succession, and such repeated mistakes were to prevent a determination from being made on a long-term basis as to whether respondent's miners were being exposed to an excessive concentration of respirable dust, then a finding might eventually have to be made that respondent was deliberately engaged in thwarting MSHA's enforcement of its respirable-dust program.

In the factual situation which existed in this proceeding, however, it appears that respondent made a single mistake in submitting the first bimonthly sample required by section 70.208(a). In such circumstances, there is considerable merit to respondent's contention that it did not "deserve this violation."

In Amherst Coal Co., 4 FMSHRC 1236 (1982), a case almost identical to this one, I held that no violation of the respirable-dust standards had occurred. In the Amherst case, I stated that respondent should not have to pay a civil penalty for having made a clerical error. In that proceeding, I cited Old Ben Coal Co., 2 FMSHRC 1187 (1980), as an example of a case in which an inspector made a clerical error in writing section 104(c)(1), instead of section 104(c)(2), on four different unwarrantable-failure orders. Yet, it was held in the Old Ben case that the inspector's clerical error should not be considered as a reason for invalidating the orders in that proceeding because the inspector's mistake did not in any way prejudice Old Ben.

The facts in this case do not show that MSHA's respirable-dust program is going to be adversely affected if respondent is absolved of the violation of section 70.208(a) alleged in Citation No. 9924829. As the motion for approval of settlement notes, respondent has been assessed for only 10 violations during the 24-month period preceding the writing of Citation No. 9924829. An operator with as favorable a history of previous violations as the respondent in this proceeding has is not likely deliberately to submit successive respirable dust samples with incorrect section numbers on them. Consequently, for the reasons given above, I find that no violation of section 70.208(a) occurred and that the petition for assessment of civil penalty should be dismissed.

WHEREFORE, it is ordered:

(A) Citation No. 9924829 dated February 12, 1981, was issued in error and is hereby vacated.

(B) The Petition for Assessment of Civil Penalty filed June 17, 1981, in Docket No. VA 81-63 is dismissed.

(C) The motion for approval of settlement filed on October 22, 1982, is denied.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

ELMER HARRIS, Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	Docket No. KENT 82-7-D
McGINNIS COAL COMPANY, INC., Respondent	:	Mine No. 2
CLARENCE JUSTICE, Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	Docket No. KENT 82-68-D
McGINNIS COAL COMPANY, INC., Respondent	:	Mine No. 2

DECISION

Appearances: Ransome C. Porter, Esq., Inez, Kentucky, for Complainants; Michael J. Schmitt, Esq., Porter, Schmitt, Preston & Walker, Paintsville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to an order consolidating issues and providing for hearing issued June 17, 1982, a hearing in the above-entitled proceeding was held on August 24 through August 28, 1982, in Prestonsburg, Kentucky, under section 105(c)(3), 30 U.S.C. § 815(c)(3), of the Federal Mine Safety and Health Act of 1977.

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 1325-1357):

> This proceeding involves two complaints of discharge, discrimination, or interference filed by Elmer Harris and Clarence Justice against McGinnis Coal Company, in Docket Nos. KENT 82-7-D and KENT 82-68-D, respectively, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977.
>
> Both complainants filed a joint complaint with the Mine Safety and Health Administration on July 29, 1981, alleging that they were discharged on May 7, 1981, by respondent in violation of section 105(c)(1) of the Act, because they had made safety complaints to respondent about the handling of explosives and had refused to operate an end loader with bad brakes on a mountain road. The complaints were filed with the Commission

under section 105(c)(3) of the Act after complainants were advised by MSHA that its investigation had shown that no violation of section 105(c)(1) of the Act had occurred.

I shall make some findings of fact on which my decision will be based. These facts will be set forth in enumerated paragraphs.

1. McGinnis Coal Company, respondent in this proceeding, was incorporated in January 1980. Its business office is in Beauty, Kentucky, and its president is Ted McGinnis who testified in this proceeding. Its first business consisted of operating a small coal mine, known as the No. 1 Mine, which was located in the Pevler complex owned by Island Creek Coal Company. McGinnis leased his coal from Island Creek and his contract with Island Creek required him to abide by the terms of the 1978 and 1981 Wage Agreements between the United Mine Workers of America and the coal operators. McGinnis was required to hire miners who were members of UMWA.

2. The No. 1 Mine had already been prepared by Island Creek for coal production before McGinnis began operating it and McGinnis produced coal from the Coalburg coal seam on two production shifts, employing a total of about 15 miners on both shifts combined. The coal produced by McGinnis was high in sulphur content and waste materials which made the coal difficult for Island Creek to process in its plant. Therefore, Island Creek asked McGinnis to reduce the output of coal from his No. 1 Mine. He first laid off the second shift. During the latter part of 1980, Island Creek ceased to accept coal for about 2 weeks. When Island Creek resumed accepting coal, it reduced the amount of coal it would accept to such an extent that McGinnis could work his day-shift crew of five miners for half a day and produce in less than a 5-day week all the coal that Island Creek would accept.

3. Island Creek advised McGinnis he could open a No. 2 Mine at a different location and deliver coal produced from the No. 2 Mine to Island Creek's Gund Mine, instead of to the Pevle complex, but McGinnis was told that Island Creek would not prepare the mine for him, and that he would be required to obtain the necessary Federal and Kentucky authorizations and construct a road and prepare a bench on the side of a mountain to serve as a means of access to the No. 2 Mine. McGinnis first offered to let the United Mine Workers of America miners at the No. 1 Mine work half a week at the No. 1 Mine and the other half at the site of the prospective No. 2 Mine, but only three of the miners wanted to do that kind of work. McGinnis did not have the heavy equipment, such as a dozer and a loader, required for preparing the No. 2 Mine site. Consequently, all the three

miners were able to do initially was cut down trees and brush to commence clearing the mine site. They worked up to the commencement of the UMWA general strike which began on March 28, 1981, and ended on June 7, 1981, when UMWA and the coal operators entered into a new contract which is Exhibit "P" in this proceeding.

4. About the time the strike began, McGinnis realized that he would not be able to prepare the No. 2 Mine site unless he could hire someone who possessed heavy equipment and ability to perform surface construction work in mountainous terrain. McGinnis first engaged an independent contractor named Charles Moore, who purported to have the expertise to do the work, but Moore had inexperienced equipment operators for the most part and did not spend enough time in supervision to make satisfactory progress. Moore became dissatisfied with the arrangement and withdrew his equipment and personnel, but during the last week that Moore worked, Moore's "ace" dozer operator, Clyde Fitch, Jr., was sent to the site and Fitch was such a skillful operator of a dozer that he accomplished more in 1 day than the other dozer operators had done in 2 weeks.

5. After Moore had withdrawn his equipment, Fitch made an offer to McGinnis to the effect that he would prepare the mine site if he (Fitch) could rent heavy equipment from Moore, or anyone else. Fitch was unable to obtain the necessary equipment and made a counterproposal to McGinnis to the effect that he would work for $700.00 per 60-hour week if McGinnis would furnish all equipment and supplies. McGinnis eventually accepted Fitch's offer after he had determined that he could obtain a D-8 Caterpillar dozer, an end loader, and a Joy Air Track drill from Island Creek Coal Company. Fitch knew that he could personally operate the dozer and end loader as much and as often as would be required, but a second person was needed to operate the drill. Fitch knew that one of the complainants in this proceeding, Clarence Justice, could operate a drill. Therefore, Fitch obtained McGinnis's permission to offer Justice $600.00 per 60-hour week, and Justice was asked to operate the drill for $600.00, but very shortly after Fitch had offered Justice $600.00 per week, Fitch decided it would improve his relationship with Justice if they were both paid $650.00 per 60-hour week. In essence, Fitch proposed that his $700.00 per-week payment would be reduced from $700.00 to $650.00 and that Justice's $600.00 per-week payment would be increased to $650.00.

6. McGinnis and Fitch also realized that they would need a laborer to cut timber, haul supplies, and do other odd jobs. McGinnis agreed to pay such a person $6.00 per hour but left the selection of the third person to Fitch. Justice suggested that the other complainant in this proceeding, Elmer Harris, be given the job as a laborer. Harris happened to be Fitch's cousin, but

Harris lives about a quarter mile from Justice, and it was Justice's suggestion that Harris be offered the laborer's job.

7. Both Justice and Harris claim that they thought they were being hired by McGinnis Coal Company not only for preparing the No. 2 Mine site, but also for prospective work in McGinnis' No. 2 Mine after they had finished getting the site prepared so that actual underground coal production could commence. Harris testified that he was in the process of building a house for Mary Prater, who works for a bank in Inez, Kentucky. Harris had a partner helping him, and it was understood that the partner would finish the house. Harris was not actually working on Mrs. Prater's house at the time he began working at the No. 2 Mine site because he had just undergone an appendectomy and was recuperating from the operation. At Fitch's suggestion, McGinnis told Harris on May 7, 1981, that Harris was not needed any longer at the mine site unless McGinnis needed Harris to help with installation of some drainage tiles at a future time. After Harris stopped working at the No. 2 Mine, he returned to working on Mrs. Prater's house and that work was completed. Harris' partner had not finished the house in the interim between the time that Harris began working at the No. 2 Mine site in March of 1981 and the time Harris was relieved from work there by McGinnis on May 7, 1981.

8. Harris also claims that he obtained an oral promise from McGinnis on Monday, the first day he reported for work at the No. 2 Mine, to the effect that McGinnis would employ Harris, possibly as an electrician, in the No. 2 Mine after it began producing coal. Both Fitch and McGinnis deny that any discussion took place involving employment of Harris as a coal-production worker at the No. 2 Mine.

9. As to the understanding Harris had at the time he left the No. 2 Mine site, Harris claims that McGinnis told him to take a week off until some drains had been put in, and Harris thought he would be called back to work when the No. 2 Mine was ready to produce coal. McGinnis testified he installed the drain tile himself and never did have any more work for Harris to do. Harris never did go back personally and ask McGinnis for a job, but on one occasion, Harris did go to McGinnis' office at Beauty, Kentucky, and ask McGinnis' bookkeeper, Homer Wright, to tell McGinnis that Harris wanted to talk to McGinnis about a job. The bookkeeper left a note for McGinnis to call Harris, but McGinnis says there was no phone number on the note and that he did not return the call because he did not take the time required to see if Harris had a phone number listed in the phone book.

10. Justice claims, just as Harris does, that he understood that he would be used as an underground worker in the No. 2 Mine

and that he specifically asked McGinnis for a job as an operator of a roof-bolting machine. Both Fitch and McGinnis deny that Justice was ever promised a job as operator of a roof-bolting machine. Exhibit 7 in this proceeding is a list of the companies for which Justice worked from 1953 to 1973. Two auto service stations and a lumber company are listed among the employers, besides coal companies, and Justice did not work for any employer for more than 2 years before changing jobs. Justice also received the maximum benefits which the state of Kentucky pays when a miner has been found to be totally disabled from silicosis. Justice applied for, but failed to obtain, any benefits under the Federal program which awards payment for disability incurred from pneumoconiosis.

11. Since Justice was laid off on May 19, 1981, while Harris was laid off on May 7, 1981, Justice was employed at the No. 2 Mine site for 12 calendar days longer than Harris was. Justice testified that McGinnis told him on May 19, 1981, that it was too wet to work in the hollow fill. Justice said that they had often had to stop working when it was wet and that he expected to be called back to work when it became dry enough, but he says that since he was told it was too wet to work, it Justice also claims that Fitch brought his last check to Justice's home, and that Fitch told him that McGinnis would call him back to work, but that McGinnis did not intend to call Harris back.

12. McGinnis testified that he let Justice know that he was no longer needed after Fitch told McGinnis that no more drilling needed to be done and no more shooting with explosives was required. As to Justice's allegation that Fitch delivered Justice's last check to Justice's home, Fitch claims that Justice and he both picked up their checks in McGinnis' office in Beauty just as they had throughout the entire No. 2 Mine site operation, and that McGinnis made it clear at that time that Justice's part of the work had been completed because McGinnis shook hands with Justice and thanked Justice for having done good work on getting the mine site ready for the underground mine to be opened.

13. Justice returned to the No. 2 Mine on two occasions between May 19, Justice's last working day at the mine site, and July 29, 1981, when Justice and Harris filed a joint complaint with the Mine Safety and Health Administration which resulted in the filing of the complaints involved in this proceeding. Justice claims that McGinnis promised to call him back to work on each of those occasions after a further state of mine development had occurred. On each occasion, one or two other persons went to the mine with Justice and one of those persons, Cubert Spence, testified that he heard McGinnis tell Justice he would give Justice his job back

in about 8 days after they had completed the second line of breaks at the No. 2 Mine. Another witness, Darvin Morrison, testified that he was helping erect a chain link fence at Justice's home when Fitch came by and told Justice that McGinnis was going to rehire Justice, but not Harris. Edward Moore was with Justice on one of Justice's trips to the mine and Moore testified that he heard McGinnis tell Justice that Justice would be called back to work in a couple of weeks.

14. McGinnis testified that Justice did come to the No. 2 Mine after it had begun to produce coal, but McGinnis claims that Justice did not ask when he would be rehired and that Justice merely asked in general terms how the mine was progressing. In fact, McGinnis said that when Justice came to the mine the last time, Justice looked at the unusually high roof from which draw rock had fallen and remarked that he did not believe he would like to work in that mine and that he could earn whatever he needed from selling scrap metal. Moreover, McGinnis stated that if he had ever been aware that Harris or Justice had agreed to work in preparing the No. 2 Mine site on the assumption that they would be given a job in the No. 2 Mine after it was opened, that he would have explained that he could not give them jobs in the mine and that he would have made that clear to them even if both of them had stopped working upon finding that to be true.

15. McGinnis testified further that hundreds of experienced miners have been laid off within the last 2 years, and that he has as many as 15 to 20 skilled miners per day come to the mine seeking employment. McGinnis stated that he has a practice of telling applicants that he will consider them along with all other applicants for jobs when and if he has an opening. At that time, he compares all applicants' background experience and inquires about their performance from past employers. McGinnis stated that he did not know for several weeks after Harris began working at the No. 2 Mine site that Harris had served some time in a penitentiary for conviction of interstate transportation of a stolen motor vehicle, and that that would have been a factor to be considered, along with others, if he had ever had a reason to consider Harris for a job in the No. 2 Mine after it was opened. McGinnis said he did not know that Harris had taken over 1200 hours of electrical training at the Pikeville Mayo Technical School. Harris conceded, despite his electrical training, that he had never held a job as a mine electrician and that he would have had to have taken additional training to have qualified for such a position.

16. McGinnis did not know when Justice worked at the No. 2 Mine site that Justice had a history of having applied for and been denied benefits under the Federal pneumoconiosis program and

did not know that Justice had actually received the maximum benefits available under the State program for total disability as a result of silicosis. McGinnis said Justice's health problem would have been a strong deterrent to McGinnis' hiring him for an underground job because McGinnis' exposure to payments for black lung benefits would have been subject to an increase.

17. McGinnis also claimed that the UMWA miners who had worked at his No. 1 Mine were placed on a panel which, under union procedures, required him to offer all of them jobs before he could have offered either Harris or Justice a job. McGinnis had 17 UMWA workers at the No. 1 Mine, and all but two of them elected to be on the panel. McGinnis did need to hire a continuous-mining machine operator and a shuttle car operator on or about July 27, 1981. He was fortunate in obtaining experienced miners to fill both positions. They had been laid off at another mine and had been operating equipment identical to that used by McGinnis for Island Creek's operations. Neither Harris nor Justice could have been considered for either job because neither was qualified to fill either position, even if McGinnis had known either of them was an applicant for such employment.

18. McGinnis maintained throughout the hearing that Fitch, Justice, and Harris had been hired as independent contractors to prepare the No. 2 Mine site. Although McGinnis personally paid each man for all the work he did, McGinnis wrote their checks from a general account and did not deduct any amount for income taxes, Social Security, or any other purpose. At the end of the year, each man was sent a Form 1099-NEC, as shown by Exhibit N in this proceeding. The letters "NEC" mean "Non-Employee Compensation." After Harris and Justice obtained a lawyer to represent them in this proceeding, each wrote a letter upon advice of counsel requesting McGinnis to send him a W-2 Form instead of the Form 1099-NEC. Those letters are Exhibits O and OO in this proceeding. Homer Wright is an accountant who works for McGinnis. He produced samples of checks written to actual employees of McGinnis Coal Company. Their checks are written on a payroll account, and those checks are accompanied by stubs showing deductions for income tax, Social Security, and other purposes.

19. A copy of each check written to Harris was introduced as Exhibits A through F; a copy of each check written to Justice was introduced as Exhibits G through M; and a copy of each check written to Fitch was introduced as Exhibits S through FF. As previously indicated, Harris was paid through May 7, 1981, when he was laid off, and Justice was paid through May 19, 1981, when he was laid off. Fitch was paid through August 8, 1981, because

all grading on the road and bench area of the mine was not completed until that time. Fitch also worked for Stafford Trucking Company for 1 month after he had stopped working for McGinnis. During the month Fitch worked for Stafford, he drove a truck which was used in hauling McGinnis' coal to Island Creek's Gund Mine. Fitch's job as a truck driver was obtained on the basis of a recommendation made by McGinnis.

20. Harris claims that the reason he was not given a job in McGinnis' No. 2 underground mine after preparation of the site had been completed, was that he had complained about the lack of brakes on the end loader, and had declined to operate the end loader for that reason after being asked by McGinnis to operate it. Justice claims that he was not hired because he also complained about the lack of brakes on the loader. Justice admits that he did operate the end loader on level ground for 2 days, but he says he declined to operate it on a hillside or steep grade. Justice additionally stated that he offered to repair the brakes himself, but that the mechanic, Morris Booth, told him it would take too much time to do so, particularly since Justice wanted to move a slack adjuster and Booth said they sometimes had to be cut off with a torch.

21. Harris presented five pictures which he had personally taken of the trailer in which the explosives were stored for use at the No. 2 Mine site. McGinnis did not realize that the pictures had been taken, and had not seen them until they were introduced as Exhibits 1 through 5 at the hearing. McGinnis and Fitch both agreed that the explosives, consisting of ammonite, permacord, detonators, and blasting powder, had been stored in a single trailer on an aluminum floor. Such storage of explosives is at least in violation of 30 C.F.R. §§ 77.1301(b), 77.1301(c)(6), and 77.1301(f). Both McGinnis and Fitch denied that either Harris or Justice had ever mentioned to them that the explosives were being stored in an unsafe manner. Harris and Justice requested that a special inspection of the explosives trailer be made by MSHA, pursuant to section 103(g)(1) of the Act, but that request was not made until July 29, 1981, the same day that Harris and Justice filed their joint discrimination complaint with MSHA. They claimed that they had tried to make complaints about the poor brakes on the loader and the improper storage of explosives while they were working at the No. 2 Mine site, but that they never could get in touch with the appropriate MSHA office.

22. MSHA did inspect the No. 2 Mine site on July 30, 1981, the day after Harris and Justice had made the request for a special investigation, but the inspectors found no violations because, by that time, only ammonite was stored in the trailer, and the inspector said that storage of ammonite, by itself, in a trailer having an aluminum floor was not in violation of the mandatory health or safety standards (Exhibit PP).

23. McGinnis claims that Fitch was actually in charge of preparing the No. 2 Mine site and that Justice and Harris received all instructions and orders from Fitch, who knew the number of hours they worked. Although McGinnis found it necessary to explain the construction plans to Fitch, the actual construction work was performed by Fitch, who was acquainted with the required procedures for moving dirt and arranging it in accordance with the plan.

24. Roger VanHoose, an operator of a continuous-mining machine at the No. 2 Mine, and Derek Merion, a roof bolter at the No. 2 Mine, testified that McGinnis operates the safest mine in which they have ever worked. They both stated that McGinnis readily considers, discusses, and shuts down production any time there is a problem about safety, and that it has never been necessary to invoke any kind of grievance procedures under the union contract in order to get McGinnis to carry out or perform or abide by safety regulations or maintain a safe mine. There was introduced as evidence in this proceeding as Exhibit RR, a list of results of inspections submitted to McGinnis by MSHA inspectors, and those reports show that inspections were made at McGinnis' No. 2 Mine on June 4, 1981, June 10, 1981, July 14, 1981, July 30, 1981, and July 31, 1981, and at no time did the inspectors ever write citations for any violations at the McGinnis No. 2 Mine during those inspections.

I believe that those are the primary findings of fact which need to be made in this proceeding.

The primary issue to be considered is whether McGinnis Coal Company violated section 105(c)(1) of the Act when its president failed to give Harris and Justice jobs in McGinnis' No. 2 Mine after it was opened.

Before the primary issue can be considered, however, a preliminary question must be resolved. Specifically, it must be determined whether Harris and Justice were employees of McGinnis Coal Company or merely independent contractors who were hired for a single construction project, upon the completion of which, both Harris and Justice would be considered to have fulfilled the purpose for which their services had been sought in the first place. In 30 C.F.R. § 45.2(c), an independent contractor is defined as "any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine."

Harris, Justice, and Fitch are persons who agreed to perform services and construction at the No. 2 Mine site. Therefore, they come within the definition set forth in section 45.2(c).

Part 45 was promulgated for the purpose of enabling MSHA to cite independent contractors for violations they commit at mines and Part 45 became effective on July 31, 1980, and was in effect when Harris, Justice and Fitch agreed to prepare the No. 2 Mine site in March 1981. Since Harris, Justice, and Fitch come within the definition of an independent contractor, each of them could have been cited for storing explosives improperly and for operating an end loader with bad brakes.

The Commission has held in such cases as Consolidation Coal Company, 1 FMSHRC 347 (1979), Kaiser Steel Corporation, 1 FMSHRC 343 (1979), Monterey Coal Company, 1 FMSHRC 1781 (1979), Old Ben Coal Company, 1 FMSHRC 1480 (1979), and Republic Steel Corporation, 1 FMSHRC 5 (1979), that MSHA may cite operators for violations committed by independent contractors. Therefore, even if the unsafe brakes and improper storage of explosives could be attributed to Harris, Justice, and Fitch, McGinnis Coal Company may also be cited for those same violations. Courts have also held that operators may be cited for violations committed by independent contractors and their employees. (Bituminous Coal Operators' Association v. Secretary of the Interior, 547 F.2d 240 (4th Cir. 1977); Association of Bituminous Contractors, Inc. v. Cecil D. Andrus, 581 F.2d 853 (D.C. Cir. 1978); and Cyprus Industrial Minerals Company v. FMSHRC and Secretary of Labor, 664 F.2d 1116 (9th Cir. 1981).

The Commission held in the Old Ben case, supra, that it would not approve MSHA's citing of an operator for an independent contractor's violation if MSHA did so purely for administrative convenience, and in Phillips Uranium Corp., 4 FMSHRC 549 (1982), the Commission declined to uphold MSHA's citing of an operator for the independent contractor's violation. Among the reasons for the Commission's refusal was its belief that the health and safety purposes of the Act would best be served by citing the independent contractor who is responsible for the violations of its own employees. Also, the Commission believed that large independent contractors, like the one involved in Phillips Uranium, are in the best position to eliminate the hazards. Moreover, the Commission majority said that citing the operator for the independent contractor's violation caused the operator to be charged in subsequent civil penalty cases with a history of previous violations, for which the operator might be unfairly charged, just for MSHA's administrative convenience.

In this proceeding, I believe that the operator, McGinnis, should be cited or held responsible for unsafe brakes, if any, on the end loader, because McGinnis had agreed to obtain the equipment used at the mine site, and McGinnis had agreed to provide fuel and maintenance for the equipment used. Likewise,

McGinnis had agreed to obtain the explosives, and had purchased the explosives from the Independent Powder Company which supplied the trailer in which the explosives were stored. Therefore, McGinnis Coal Company, or the operator, should have been cited for the explosive-storage violations which occurred.

It has been shown above that McGinnis Coal Company was liable for the violations of the mandatory health and safety standards alleged by Harris and Justice, but the question still remaining to be decided is whether McGinnis Coal Company can be cited for a violation of section 105(c)(1), when the person alleging the violation qualifies as an independent contractor under the definition of an independent contractor given in section 45.2(c). Section 105(c)(1), in pertinent part, reads as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, * * * or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Section 3(f) of the Act defines a "person" as: "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization," and section 3(g) defines a "miner" as: "any individual working in a coal or other mine." McGinnis Coal Company is a person as that term is used in section 105(c)(1), and Justice, Harris, and Fitch were miners as the term "miner" is used in section 105(c)(1). Therefore, regardless of whether McGinnis hired Harris, Justice, and Fitch as independent contractors, those independent contractors were also miners within the meaning of section 105(c)(1), and if McGinnis Coal Company declined to hire Harris and Justice because they made safety complaints, or disengaged them as independent contractors before their services as independent contractors had been completed, because they made safety complaints, McGinnis Coal Company violated section 105(c)(1) in so doing.

The Commission, in Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), gave its rationale as to what must be shown by a complainant to establish a violation of section 105(c)(1). The Pasula decision was reversed in Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1982), but the Commission has indicated in Northern Coal Company, 4 FMSHRC 126 (1982), and in Phelps Dodge Corporation, 3 FMSHRC 2508 (1981), that its Pasula rationale was not changed by the court's reversal which was based on the court's belief that the Commission had improperly used certain evidentiary facts. Therefore, the Pasula test is still applicable law, and according to Pasula (2 FMSHRC 2799-2800):

> * * * the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. [Emphasis is integral part of quotation.]

I believe that the evidence shows that Justice and Harris engaged in a protected activity. Both of them claimed that the brakes were defective on the end loader. Fitch, who was the primary equipment operator, said there was nothing whatsoever wrong with the loader's brakes, but McGinnis, who also operated the loader at times, candidly stated that while he had no difficulty in operating the loader, even on a grade, he would have to admit that the brakes were not as effective as they might have been. Justice is a mechanic, and his testimony about volunteering to move the slack adjuster sounds very much like something that might have occurred. McGinnis' mechanic refused to let Justice perform that work because he felt it would take excessive time to

do so. While Fitch claimed that a loader without brakes could not be operated at all, his efforts to explain why that was so were unconvincing, and McGinnis' effort to explain what Fitch was trying to say increased my belief that a loader can be operated with poor brakes if an experienced operator really wants to please his employer by doing so.

I believe that Justice, rather than Harris, was the person who complained about the loader's brakes, because Harris had no experience at all in operating heavy equipment, whereas Justice, on occasion, did operate heavy equipment and, for 2 days, did run the loader on level ground.

On the other hand, I believe that Harris was the person who complained about the improper storage of explosives. Justice was quite knowledgeable in use of explosives, and Justice prepared the shots or supervised Harris and McGinnis in preparing the shots. Still, it was Harris who most often obtained explosives from the trailer and brought them to the holes for use in actual blasting operations. If Harris had not been concerned about the unsafe storage methods, he would hardly have had any reason to make five photographs of the storage trailer, particularly since the pictures were made before Harris was told that his services were no longer needed (Exhs. 1-5).

Fitch and McGinnis both claim that neither Harris nor Justice ever complained about any unsafe condition, but they both admitted that a lot of joking about explosives occurred. It may be that in the kidding that existed, both Fitch and McGinnis simply ignored the warnings which Harris and Justice expressed. McGinnis conceded that he was not careful in checking into the fact that neither Harris, Justice, Fitch, nor he himself was a licensed shot firer. Some of the evidence thus supports a finding that Harris and Justice engaged in protected activities when they complained about unsafe brakes on the loader and improper storage and handling of explosives.

The preponderance of the evidence, however, fails to show that when McGinnis told Harris and Justice their services were no longer needed, that he was motivated in letting them go by the fact that they had complained about unsafe brakes on the loader or improper storage of explosives. Although both Harris and Justice claim that they were let go with the understanding that they would be recalled to work when the No. 2 Mine began to produce coal, they failed to show that the work for which they had been hired remained uncompleted at the time they were laid off.

The work which Harris had been performing consisted of getting explosives out of the truck, taking it to the holes drilled by Justice, and helping in filling the holes and in firing shots. Harris also greased equipment and obtained supplies, such as fuel, for the equipment. Justice conceded that most of his time was used in drilling holes and preparing shots. There was no dispute by Harris or Justice about the fact that no drilling or shooting on the surface needed to be done at the time McGinnis let them go. The only work to which they could have been recalled would have been to a position as an underground miner in the No. 2 Mine after it was opened. Harris was unable to show that he was qualified to do a single job in the mine without taking additional training as an electrician, and Justice could not have qualified for a roof bolter without taking some training. In short, Justice and Harris were unable to show that McGinnis had any further need for their services at the time they were told that no work remained for them to do. Moreover, they were unable to show that all dozer work had been completed at the time they left. Consequently, no finding can be made that McGinnis discriminated against them by continuing to pay Fitch for operating the dozer for several weeks after they had left.

Assuming that another person reading the testimony in this proceeding might disagree with my finding that Harris and Justice failed to satisfy the second step of the Pasula test by showing that their dismissal was motivated by their having complained about unsafe brakes and improper storage of explosives, I shall now examine the evidence to determine whether McGinnis would have taken the adverse action of dismissal, or refusal to rehire, in any event because of Harris' and Justice's having engaged in unprotected activities.

In the Commission's Phelps Dodge decision, supra, the Commission stated (3 FMSHRC at 2516):

> * * * Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise". * * * The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis and meets the first part of the Pasula affirmative defense test, then a limited examination of its substantiality

becomes appropriate. The question, however, is not whether such justification comports with the judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined that miner.

McGinnis provided several reasons for his failure to rehire Harris and Justice over the experienced UMWA miners from his No. 1 Mine.

(1) There is no doubt but that McGinnis was required by Article XVII of the UMWA Coal Wage Agreements of 1978 and 1981 (Exhs. P and R) to fill openings at the No. 2 Mine by taking miners from the panel of miners formed when McGinnis ceased to operate a second shift at the No. 1 Mine. There was an enlargement of UMWA miners with seniority rights for transfer to the No. 2 Mine when McGinnis closed the No. 1 Mine entirely before opening the No. 2 Mine.

(2) The only openings at the No. 2 Mine not filled by transfer of UMWA miners from the No. 1 abandoned Mine were the positions of an operator of a continuous-mining machine and an operator of a shuttle car, and neither Harris nor Justice was qualified to fill either of those positions.

(3) There was never a showing by Harris or Justice that McGinnis knew that they wanted jobs as underground miners. Neither of them actually alleged that they were qualified to fill even the jobs they claim to have discussed, that is, roof bolter as to Justice, and electrician as to Harris.

(4) There is little doubt but that Harris and Justice could have gone to school and could have become qualified for some sort of underground miner's job, but neither of them specifically discussed with McGinnis the actual schooling they would need, and neither got McGinnis' approval that he would undertake to hire either of them for a specific job if they had arranged to obtain the necessary training. While it is true that McGinnis may inadvertently have misled them by saying that he would consider them when he had an opening, McGinnis claims he tells all applicants that and does consider all applicants in light of their qualifications when such openings do occur.

If Harris and Justice did work at clearing the site for the No. 2 Mine solely because they thought they would be hired for a position at the No. 2 Mine when it was opened, and even if McGinnis deliberately led them to think that they would get

positions in the underground mine, McGinnis' failure to hire them as underground miners after the site was cleared was not a violation of section 105(c)(1), inasmuch as McGinnis did not refuse to hire them as underground miners because of safety complaints.

One reason for making the foregoing conclusion is that McGinnis does not use end loaders underground and complaints about brakes on surface equipment would not have been an overriding consideration when Harris' and Justice's lack of qualification is examined in light of McGinnis' obligation to hire UMWA miners on the panel from the No. 1 Mine and the highly experienced unemployed miners otherwise available. The same consideration would also apply to complaints about improper storage of explosives, because McGinnis did not need explosives to operate his No. 2 underground mine since the coal was produced by a continuous-mining machine which does not rely upon explosives for extracting coal. That McGinnis did not need explosives after the site had been cleared for opening the No. 2 Mine is indicated in Finding No. 22, supra, where it is noted that before McGinnis began operating the No. 2 Mine, he had removed from the surface area of the mine all explosives except some ammonite which, when stored by itself, was stated by an MSHA inspector to be nonhazardous.

The foregoing examination shows that McGinnis' letting Harris and Justice go and his failure to rehire them as underground miners, were decisions based on business justifications, which were "not plainly incredible or implausible". I believe that the preponderance of the evidence shows that McGinnis would have taken the actions he did take as to Harris and Justice for the reasons he gave, regardless of whether they had complained about unsafe brakes on the loader or improper storage of explosives.

WHEREFORE, it is ordered:

The complaints filed by Elmer Harris and Clarence Justice, in Docket Nos. KENT 82-7-D and KENT 82-68-D, respectively, are denied.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 82-18
v.	:	AC No. 46-01867-03088V
CONSOLIDATION COAL COMPANY, Respondent	:	
CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Citation
	:	Docket No. WEVA 81-552-R
v.	:	Citation No. 856134
	:	Dated: July 20, 1981
SECRETARY OF LABOR, Respondent	:	

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner and Respondent
Jerry F. Palmer, Esq., Consolidation Coal Company, for Respondent and Contestant

Before: Judge Fauver

These proceedings involve the same citation issued under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. The Secretary seeks a civil penalty for a violation of a mandatory safety standard as alleged in the citation. The company seeks to have the citation reviewed and vacated.

The cases were consolidated and heard at Morgantown, West Virginia.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times Consolidation Coal Company ("Consol") operated an underground mine known as Blacksville No. 1 Mine, which produced coal for sale or use in or substantially affecting interstate commerce.

2. On July 20, 981, MSHA Inspector William Ponceroff observed a roof condition that he found to be in violation of 30 CFR § 75.200, and, on the basis of this finding, issued Citation No. 956134; the citation was modified the next day to insert one word left out in the citation. The citation, as modified, reads:

> The mine roof was not adequately supported 35' inby the old 1 West loader switch. There were 3 dislodged roof bolts that fell out and these bolts were installed in a fall cavity. The distance between the last permanently installed roof bolts to a arch located inby measured 9'3" and 10'4". The width of this area measured 13'10". The height of this cavity was approximately 15' high. There were loose pieces of rock in this area and the roof was broken. This area was not supported between the bolts and arch. Motormen travel through this area to switch emply mine cars. The condition was reported to Bill Galeota, the day shift foreman, by Glen Clutter on 7/10/81. This condition should have been reported in the preshift examination book, and roof bolts should have been installed. Neither action was taken.

3. The facts alleged in the citation were proved by a preponderance of the evidence. Some of the roof bolts had been dislodged, leaving the roof unsupported for about 9 feet, 3 inches on one side and 10 feet, 4 inches on another side. There were loose pieces of roof hanging and some had already fallen. Miners normally traveled under this area of the roof. The cited area was in a track haulageway where empty cars were switched off by motormen to a rotary dump. The motormen did not have canopies on their vehicles.

4. The roof condition was hazardous, and could significantly and substantially contribute to a mine hazard.

5. The roof condition was readily observable and had existed for a substantial period before the inspection on July 20, 981. Mine management was negligent in not detecting and correcting the hazardous roof condition before the inspection.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of these proceedings.

2. Consol violated 30 CFR § 75.200 on July 20, 1981, as alleged in Citation No. 856134, modified on July 21, 1981. The facts showed an unwarrantable failure to comply with the safety standards of this section, specifically the sentence: "The roof and ribs of all active underground roadway, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs."

3. Based upon the statutory criteria for assessing a civil penalty for a safety violation, Consol is assessed a penalty of $1,500 for the above violation.

Proposed findings of fact or conclusions of law inconsistent with the above are rejected.

ORDER

WHEREFORE IT IS ORDERED:

1. Citation No. 856134, issued on July 20, 1981, and modified on July 21, 1981, is, as modified, AFFIRMED.

2. Consol shall pay to the Secretary of Labor the above-assessed civil penalty of $1,500 within 30 days from the date of this decision.

William Fauver

WILLIAM FAUVER, JUDGE

Distribution Certified Mail:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No: SE 81-26-M A.O. No: 00212-05001-IP 9
v.	:	Lee Creek Mine
A. B. WHITLEY, INC., Respondent	:	
A. B. WHITLEY, INC., Contestant	:	Notice of Contest
v.	:	Docket No: SE 81-11-RM Citation No. 109908; 11/18/80
SECRETARY OF LABOR, et al Respondent	:	Lee Creek Mine

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia for Petitioner
James W. Stephens, Safety Associates, Inc., P.O. Box 4113, Charlotte, North Carolina for Respondent

Before: Judge Moore

The Respondent is accused of violating 30 C.F.R. 55.13-21 which provides:

> "Except where automatic shut-off valves are used, safety chains or other suitable locking devices shall be used at connections to machines of high pressure hose lines of 3/4" inside diameter or larger, and between high pressure hose lines of 3/4" inside diameter or larger, where a connection failure would create a hazard."

It was admitted that the hose connection which lead to the citation issued in this case was between a high pressure hose line of a diameter 3/4" or greater and a sand box or grit pot, and that there was no separate safety chain or other locking device used except the device which initially couples the two parts of the connector hose together. The purpose of the regulation is to prevent injuries that can occur and have occurred when high pressure hoses have parted. The whipping action of the hose is what creates the hazard.

Petitioner exhibit 3 is a report prepared by Roy L. Jameson of the Department of the Interior's Denver Technical Support Center on December 18, 1975. The title of the exhibit is "Report on Air Hose Couplings,

Clamps and Restraining Devices." The third paragraph in the report was referred to on several occasions. It states:

> "the whipping action of an unsecured or burst compressed air hose or pipe has resulted in many severe injuries and uncounted and unrecorded near-miss accidents. Confined working areas in underground mines causes this hazard to be particularly acute; the victim(s) often has few, if any, avenues of escape from the lashing and whipping action of an unsecured hose."

It is the position of the respondent and two of his witnesses that because of the above quoted paragraph the report is concerned only with underground mining. I reject that contention even though it is plain that the hazard could be greater in a confined area. The second accident described in Appendix E attached to petitioner's exhibit 3 describes an accident at "the Columbia Quarry and Mill, an open pit granite operation,..."

Respondent's exhibits 1 and 2 are photographs of the type of high pressure hose coupling that Respondent was using at the time the citation was issued. Respondent's exhibit 2 shows the mechanism when it is disconnected and Respondent's exhibit 1 is a picture of the connected hose. The exhibit should be held with the red or orange pipe at the bottom. The flange at the bottom of the upper connector on Respondent's exhibit 2 is placed over the threads on the orange pipe and turned approximately 4 revolutions before it is fully connected as shown in Respondent's exhibit 1. The flange is not circular but has lugs which are hit with a sledge hammer to tighten the connection. The unrefuted testimony was that if this flange should become loose and untightened by one turn, sufficient air would be lost so that the machinery could not be operated. The chance that this connection could suddenly part and whip around injuring unwary miners is almost negligible. The warning would be when the machine stopped its function of sand blasting and also the noise that would escape when the flange had unscrewed one turn. As stated it takes 4 turns to disconnect the flange and hose from the machine to which the pipe is attached.

Douglas K. Wortham, is assistant director of the mine and quarry division of the North Carolina Department of Labor. He testified that he had observed numerous sand-blasting operations and that in about 90% of those operations the type of connector involved in the instant case, was used. He testified that a separate locking device was not used in those operations, that it was not required by the state of North Carolina and that it was not necessary because the connector was safe.

Andrew B. Williams, a manufacturer's agent has had wide experience with compressed air equipment. He testified that the type of connector used by the Respondent in this case was the safest compressed air connector available and that it did not need a separate chain or other securing device.

There are a number of different types of high pressure hose connectors. (See Petitioner's exhibit 3). The two types referred to most in the testimony in the instant case were the type used by Respondent and a quick disconnect Chicago type connector. In the quick disconnect type one end of the hose is inserted into the other and a quarter turn (90°) is made to secure the connection. MSHA accepts a pin through the connector in such a way as to block rotation as a suitable locking device. There is no requirement that the hose itself, as distinguished from the connector fixed at its end be connected to the other hose or machine if there is no other hose involved. As to the type of connector used by Respondent, Inspector Darryl Brennan stated that he would require that the chain or cable be affixed to the flexible hose itself and that the other end be affixed to the grit pot end of the connector. It appears to be a double standard. In the case of the quick disconnect type MSHA is concerned only with the metallic coupling separating, whereas with the type Respondent uses MSHA, or at least Inspector Brennan, is concerned not only that the metallic parts of the connection might separate, but that the hose itself might separate from the metallic connector. The mechanism that holds the connector or more properly, half of the connector to the hose is shown on Respondent's exhibits 1 and 2. It is above the rotating flange and has what appears to be H-37 stamped on it. It is held by 4 bolts but the actual means by which it is attached to the hose was not explained. I do not know whether there is any danger of the hose separating from the "clamp" which contains the H-37. I am construing the standard as MSHA does with respect to the quick disconnect type, as requiring the metal connectors to be secured by an extra locking device. The hose itself could break anywhere and the only way whipping could be prevented would be to attach a safety chain to each 3 or 4 foot section of the hose and the standard certainly does not require that.

I would like to dismiss this case, because I think the connector is safe but I can not overlook the fact that the standard requires safety chains or suitable locking devices in addition to the normal attaching mechanism of the connectors if a connection failure would create a hazard. Since there were men within 2 or 3 feet of the hose (Tr. 21) a sudden disconnection would create a hazard. I find the negligence and gravity low but that the violation did occur. A nominal penalty of $1 is assessed and Respondent is Ordered to Pay that amount to MSHA within 30 days of the issuance of this decision. The citation is affirmed.

Charles C. Moore, Jr.,
Administrative Law Judge

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